Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

VISALAKSHI MALLADI,
Petitioner,

v.

TOGO WEST, JR.,
in his official capacity as Secretary,
Department of Veterans Affairs,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial judge's refusal to reopen seven (7) EEO complaints underlying a global settlement agreement violated this Court's position in *Raley v. Ohio,* 360 U.S. 423 (1959)?

2. Whether the trial judge incorrectly applied the *McDonnell Douglas* "circumstantial evidence" analysis to the Plaintiff's Title VII retaliation claim instead of the "direct evidence" analysis?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with the Supreme Court Rule 14(b), Petitioner represents to the Honorable Court that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES, PARENT COMPANIES AND SUBSIDIARIES	ii
TABLE OF AUTHORITIES	v
REFERENCE TO REPORTS OF OPINIONS	1
CONCISE STATEMENT OF GROUNDS FOR JURISDICTION	1
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition in the Court Below	2
B. Statement of the Facts	3
REASONS FOR GRANTING THE PETITION	6
I. THE PLAINTIFF'S RELIANCE ON THE GLOBAL SETTLEMENT AGREEMENT, AND THE DEFENDANT'S BREACH OF IT, ENTITLED THE PLAINTIFF TO PURSUE HER SEVEN (7) EEO COMPLAINTS	6
II. THE TRIAL COURT INCORRECTLY APPLIED THE *McDONNELL DOUGLAS* "CIRCUMSTANTIAL EVIDENCE" ANALYSIS TO THE PLAINTIFF'S TITLE VII RETALIATION CLAIM, AFTER THE PLAINTIFF PROVIDED "DIRECT EVIDENCE" OF RETALIATION	9
CONCLUSION	13
APPENDIX	
A. Opinion and order of the Eleventh Circuit Court of Appeals	1a

TABLE OF CONTENTS—Continued

Page

B. Opinion and order of the U.S. District Court for the Middle District of Alabama 2a

C. Order of the Eleventh Circuit Court of Appeals on Rehearing 61a

TABLE OF AUTHORITIES

CASES	Page
Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983)	9, 10
Blalock v. Metals Trades, Inc., 775 F.2d 703 (6th Cir. 1985)	10
Collier v. Brown, 285 Ala. 40, 228 So. 2d 800 (1969)	6
Evans v. McClain of Georgia, Inc., 131 F.3d 957 (11th Cir. 1997)	10
Longariello v. School Bd. Of Monroe County Fla., 987 F. Supp. 1440 (S.D. Fla. 1997)	10
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9
McNutt v. Board of Trustees of Univ. of Ill., 141 F.3d 706 (7th Cir. 1998)	13
Raley v. Ohio, 360 U.S. 423 (1959)	8
Robin v. Sun Oil Co., 548 F.2d 554 (5th Cir. 1977)	6
Schwartz v. Florida Board of Regents, 807 F.2d 901 (11th Cir. 1987)	6
Tanca v. Nordberg, 98 F.3d 680 (1st Cir. 1996)	13
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985)	10
Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986)	9, 10

FEDERAL STATUTES	
28 U.S.C.S. § 1254(1)	2
28 U.S.C.S. § 1291	2
42 U.S.C.S. § 2000e-2(m)	13
42 U.S.C.S. §§ 2000e-3(a)	9, 13

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on July 16, 1998 (App. A, 1a) and the order denying rehearing and rehearing en banc was entered on October 2, 1998 (App. C, 61a). The published decision of the United States Court for the Middle District of Alabama was entered on December 1, 1997 (App. B, 2a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgement or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated July 16, 1998, and rehearing en banc decision is dated October 2, 1998.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court rules provides for review of a court of appeals decision when it conflicts with relevant decisions of this Court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The plaintiff, Dr. Visalakshi Malladi, filed her complaint in the United States District Court for the Middle District of Alabama on March 8, 1996. On July 8, 1996, October 10, 1996 and again on January 21, 1997, the Plaintiff's complaint was amended. The Defendant, Jesse Brown, in his official capacity as Secretary of Veterans Affairs, filed an answer on August 8, 1996. On June 18, 1997, the Defendant filed a motion for summary judgment, accompanied by exhibits and a memorandum brief. Later, Togo D. West, Jr. succeeded Jesse Brown as Secretary of Veterans Affairs.

On July 21, 1997, the Plaintiff filed a response to the Defendant's motion for summary judgment along with exhibits. On August 4, 1997, the Defendant filed a reply brief in support of his motion for summary judgment on August 6, 1997. The Defendant submitted supplemental authorities in support of the motion for summary judgment on September 11, 1997.

The case was scheduled to be tried before a jury on September 10, 1997, but it was reset for trial January 5, 1998. The trial judge, however, granted the Defendant's motion for summary judgment on December 1, 1997, in a seventy-two (72) page memorandum opinion. The Plaintiff filed notice of appeal to the United States Court of Appeals for the Eleventh Circuit on December 22, 1997. The basis for jurisdiction in the court of appeals was 28 U.S.C. § 1291. Following the filing of briefs by

the respective parties, the Eleventh Circuit released a per curiam opinion affirming the trial judge's summary judgment order on July 16, 1998. Later, on October 2, 1998, the Eleventh Circuit Court of Appeals denied the Plaintiff's Petition for Rehearing/Suggestion on Hearing En Banc. On November 23, 1998, the Plaintiff filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(2) with the trial judge. On December 7, 1998, the trial judge entered an order denying the Plaintiff's motion for relief from judgment.

B. Statement of the Facts.

The Plaintiff, Dr. Visalakshi Malladi, is a handicapped female of Asian origin from the Indian Sub-Continent, and is a citizen of the United States. In 1985, the Plaintiff was hired as a physician in rehabilitative medicine with the United States Department of Veterans Affairs at the VA Medical Center in Big Spring, Texas. In February 1988, Dr. Malladi began employment as a staff physiatrist[1] at the Tuskegee Veterans Affairs Medical Center ("TVAMC"). On March 31, 1989, the Plaintiff was appointed Chief of Physical Medicine and Rehabilitation Service ("PM & RS") at the TVAMC. During this period of time. Mr. Jimmie L. Clay was Medical Director at the TVAMC, and Dr. Stanley B. Kahane was Chief of Staff at the TVAMC.

Between December 24, 1992, to January 11, 1995, the Plaintiff filed seven (7) separate Equal Employment Opportunity administrative complaints ("EEO complaints") against the TVAMC. In those seven (7) separate EEO complaints, the Plaintiff alleged that the TVAMC had discriminated against her because of her race, sex, national origin, and handicap, also, she alleged that the TVAMC had retaliated against her for filing prior EEO complaints.

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[1] A physiatrist is a physician who specializes in physical medicine and rehabilitation, that is, the treatment of illnesses by way of physical means.

On March 30, 1995, the Plaintiff and the Defendant settled the seven (7) EEO complaints by entering into a "global" settlement agreement.

On June 29, 1995, the Plaintiff wrote a letter to the Discrimination Complaint Service of the VA Central Office located in Washington, D.C., asking the VA to reopen the seven (7) EEO complaints based on the Plaintiff's allegations that the VA had breached several provisions of the global settlement agreement. On August 25, 1995, the Plaintiff filed an eighth (8th) EEO complaint against the TVAMC. On September 27, 1995, Mr. Jimmie L. Clay, Medical Director at the TVAMC, filed a reply to the Plaintiff's letter of June 29, 1995. In his reply, Mr. Clay stated that the TVAMC had not breached any provisions of the global settlement agreement. On October 23, 1995, the VA issued its ruling that the TVAMC had not breached the global settlement agreement, but the Equal Employment Opportunity Commission (EEOC) determined that the VA had breached its agreement to provide management training to the Plaintiff.

In the fall of 1995, Mr. Jimmie L. Clay, Medical Director for the TVAMC, requested the VA Central Office to schedule a site visit of the PM & RS. Mr. Clay sought the site visit review because of alleged allegations of mismanagement and poor leadership on the part of the Plaintiff. On October 30, 1995, the Plaintiff filed a ninth (9th) EEO complaint against the TVAMC. On November 13, 1995, the Plaintiff appealed the October 23, 1995 ruling issued by the VA that it had not breached the global settlement agreement to the EEOC. On November 14, 1995, Dr. Leigh Anderson, Chief, PM & RS, at the Denver, Colorado VA Medical Center contacted Mr. Jimmie L. Clay and informed him that he and Mr. John Jacobson, PM and RS Coordinator at the Seattle, Washington VA Medical Center would conduct the site visit. During that contact, Dr. Anderson specifically asked Mr. Clay to provide him with various material pertaining to the staff and operations of the PM & RS at the TVAMC. Also, Dr.

Anderson asked Mr. Clay to provide him with summaries of prior EEO complaints filed by the Plaintiff.

On December 14-15, 1995, the site visit review took place at the PM & RS of the TVAMC. On January 2, 1996, the Plaintiff filed a tenth (10th) EEO complaint against the TVAMC. On January 16, 1996, the site visit review team issued its report. Among other things mentioned in that report, the team specifically noted the frequency with which the Plaintiff filed EEO complaints and its alleged impact upon the operation of the PM & RS. The report ultimately recommended that the Plaintiff be removed from the position of Chief of PM & RS. On January 22, 1996, the Plaintiff filed her eleventh (11th) EEO complaint against the TVAMC. On February 6, 1996, Dr. Stanley B. Kahane recommended to Mr. Jimmie L. Clay that the Plaintiff be permanently reassigned from her position as Chief of PM & RS to a staff physician in the medical center's ambulatory care service, basing the decision upon the site review team report. In a memo dated February 6, 1996, Mr. Clay notified the Plaintiff that she would be permanently reassigned as a staff physician effective February 18, 1996, again relying on the report.

On February 14, 1996, the Plaintiff filed a twelfth (12th) EEO complaint against the TVAMC. On March 4, 1996, Mr. Clay gave the Plaintiff a letter of admonishment pertaining to her management of the PM & RS. On March 8, 1996, the Plaintiff filed her lawsuit in this case. On March 28, 1996, the Plaintiff filed her thirteenth (13th) EEO complaint against the TVAMC. In addition to the aforementioned EEO complaints filed by the Plaintiff, she also filed three (3) administrative grievances with the TVAMC between February 12, 1996, and April 17, 1996. On December 18, 1996, the EEOC ruled that the VA had breached a provision of the global settlement agreement pertaining to providing the Plaintiff with an opportunity for management training. Instead of ordering the VA to reinstate the Plaintiff's seven (7) EEO

complaints underlying the settlement agreement, it ordered the VA to implement that breached provision.

The aforementioned EEO complaints filed by the Plaintiff and the three (3) administrative grievances filed by the Plaintiff were properly raised and included in the Plaintiff's complaint. The trial judge disposed of the EEO complaints and the administrative grievances in his memorandum opinion granting the Defendant's motion for summary judgment dated on December 1, 1997. The trial court based its decision on what it apparently felt was an excessive use of the EEO complaint system by Dr. Malladi, and applied the indirect evidentiary standard to her claims.

REASONS FOR GRANTING THE PETITION

I. THE PLAINTIFF'S RELIANCE ON THE GLOBAL SETTLEMENT AGREEMENT, AND THE DEFENDANT'S BREACH OF IT, ENTITLED THE PLAINTIFF TO PURSUE HER SEVEN (7) EEO COMPLAINTS.

The district judge in his memorandum opinion held that the Defendant's breach of a provision contained in a global settlement agreement with the Plaintiff did not entitle the Plaintiff to pursue her seven (7) EEO complaints underlying that agreement, since the breach, according to the trial judge, did not constiute a "material" breach. As the Eleventh Circuit Court of Appeals stated in *Schwartz v. Florida Board of Regents,* 807 F.2d 901, 905 (11th Cir. 1987), "[a] settlement agreement is a contract and, as such, its construction and enforcement are governed by a principles of [Alabama] general contract law." Likewise, in *Robin v. Sun Oil Co.,* 548 F.2d 554, 557 (5th Cir. 1977), the appellate court noted that "[w]ords in a contract must be given their usual and ordinary meaning, and technical words are given their usual legal meaning." Furthermore, in *Collier v. Brown,* 285 Ala. 40, 44, 228 So. 2d 800, 803 (1969), the State

Supreme Court declared that a "general rule of contract law states that when the parties reduce their agreements to writing, the writing—in the absence of mistake or fraud or ambiguity—is the sole expositor of the transaction and the intention of the parties." As those prior cases clearly indicate, it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction.

The concluding provision of the global settlement agreement entered into by the Plaintiff and the Defendant specifically declared that "the VA agrees that, should it fail to comply with any of the terms set forth herein for reasons not attributable to acts or conduct of the complainant, it will reopen the complaint for further processing at the point in the process where processing ceased as a result of this agreement." In his opinion, the trial judge agreed with the EEOC that the Defendant had breached the provision of the global settlement agreement requiring it to provide the Plaintiff with the opportunity for management training. Despite that specific finding that a breach of the agreement had occurred, the trial judge held that the Plaintiff was still bound by the global settlement agreement, since the breach by the Defendant did not constitute a "material" breach.

There is no question that the application of the contractual principle of "materiality" is designed to prevent unreasonable forfeiture to defaulting parties for minor breaches of a contract. However, such a contract principle has no application when the parties to a contract have specifically set forth in it, in plain and unambiguous terms, their intended mutual agreement that should one of the parties fail to "comply with any of the terms" of the contract that the other party will be released from the obligation of that contract. Therefore, Dr. Malladi is entitled to pursue the seven (7) EEO complaints underlying the contract in this case.

The Plaintiff, in exchange for not pursuing her seven (7) EEO complaints against the Defendant, was promised by the Defendant that certain actions would be taken by it. It was expressly agreed that if the Defendant failed to comply with any of the provisions stated in the global settlement agreement, that the Plaintiff would no longer be bound by the agreement and could therefore pursue her seven (7) EEO complaints. The promise made to the Plaintiff by the Defendant is similar to the assurances made to several Ohio citizens appearing before that state's commission that they could exercise their privilege against self-incrimination without reprisal by the state. In that case of *Raley v. Ohio*, 360 U.S. 423 (1959), this Court held that the State of Ohio could not pursue criminal charges against its Ohio citizens for exercising a right promised to them by the State. Likewise, the Defendant here should not be allowed to induce the Plaintiff into entering into a global settlement agreement, an agreement that specifically provided that the Plaintiff could pursue her seven (7) EEO complaints against the Defendant if the Defendant violated any of the agreement's provisions, and thereafter hold the Plaintiff to that agreement after the Defendant had breached it.

In this case, the trial judge and the Eleventh Circuit Court of Appeals ruled contrary to this Court's position taken in the *Raley* case. As such, the Plaintiff should be permitted to pursue her seven (7) EEO complaints against the Defendant as set forth in the terms of the global settlement agreement.

II. THE TRIAL COURT INCORRECTLY APPLIED THE *McDONNELL DOUGLAS* "CIRCUMSTANTIAL EVIDENCE" ANALYSIS TO THE PLAINTIFF'S TITLE VII RETALIATION CLAIM, AFTER THE PLAINTIFF PROVIDED "DIRECT EVIDENCE" OF RETALIATION.

An employee may establish retaliation under Title VII by either "direct evidence" or by "circumstantial evidence" of discriminatory intent.[2] Where an employee provides direct evidence to a court that discrimination was a motivating factor in an employee's decision which has an adverse employment effect upon that employee, and a trier of fact accepts that employee's evidence, then the ultimate issue of discrimination has been proven by the employee. As such, the employer may avoid liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account. *Wilson v. City of Aliceville,* 779 F.2d 631, 634 (11th Cir. 1986); *Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. denied,* 467 U.S. 1204 (1984).

However, where an employee presents circumstantial evidence to a court that discrimination was a motivating factor in an employer's decision which has an adverse employment effect upon that employee, the employee creates only a rebuttable presumption that the employer unlawfully discriminated against him. The burden of production, not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas Corp.*

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[2] 42 U.S.C.S. § 2000e-3(a) states that it is unlawful for an employer to retaliate against an employee for having participated in a protected activity. Specifically, Title VII declares that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. §§ 2000e-2000e-17]."

v. Green, 411 U.S. 792, 802 (1973); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 963 (11th Cir. 1997); *Longariello v. School Bd. Of Monroe County, Fla.*, 987 F. Supp. 1440, 1447-48 (S.D. Fla. 1997). Once an employee presents direct evidence to a court of discriminatory intent in the decision-making process of an employer, the *McDonnell Douglas* burden-shifting analysis becomes inapplicable in the court's evaluation of the case. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Wilson*, 779 F.2d at 634; *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985); *Bell*, 715 F.2d at 1557.

Whether an employee provides a court with a direct or circumstantial evidence of employment discrimination impacts upon the burden of proof which the court expects the employer to meet in refuting the employee's evidence. In this case, the Plaintiff provided the trial judge with direct evidence of employment discrimination, specifically retaliation, against her by the Defendant for her having filed prior EEO complaints against the Defendant. Despite the Plaintiff's presentation of direct evidence of retaliation against her by the Defendant, the trial judge incorrectly applied the *McDonnell Douglas* circumstantial evidence analysis in this case. By such action, the trial judge incorrectly lessened the Defendant's burden of proof in resisting the Plaintiff's evidence of retaliation.

The Plaintiff's direct evidence of retaliation against her by the Defendant manifested itself in a number of ways. One of the ways was in the Defendant's request to review prior EEO complaints filed by the Plaintiff against it. This request for summaries of prior EEO complaints filed by the Plaintiff came through the Central VA Office in Washington, D.C., which sought those records as part of a scheduled site review planned for the PM & RS at the TVAMC. Though the request by the VA to review the Plaintiff's prior EEO complaints may seem insignificant, the request took on an added significance when the site review team issued its report following its review of the

PM & RS conducted on December 14-15, 1995. In the site review report, issued January 16, 1996, it specifically mentioned the number of prior EEO complaints filed by the Plaintiff against the TVAMC, and its impact upon the TVAMC. Specifically, the site review report stated the following:

> Since December of 1992, the Chief, PM & RS [Plaintiff] has registered a total of 12 EEO complaints against the [Medical] Director, Chief of Staff, and Associate Director (triad) alleging discrimination on the basis of race, disability and gender. In review of the EEO records, the majority of filings stem from the Chief's [Plaintiff's] perceived feeling of discrimination relating to a refusal by triad to provide additional physician staffing to PM & RS. Seven of the complaints have been resolved via a global settlement agreement signed March 30, 1995. The Chief [Plaintiff] has continued to register complaints to the EEO Commission based on perceived reprisal from the triad in relation to her original complaint. As a result of the continued filing, the members of the triad feel incapacitated in providing the Chief [Plaintiff] with adequate direction and assistance in management of her service. In discussion with Dr. Torrado, the Staff Assistant for EEO, this continued filing has also burdened the EEO system at the hospital and resulted in excessive provision of resource by the EEO Staff to continually review Dr. Malladi's complaints.

Following the release of the site review report on January 16, 1996, Mr. Jimmie L. Clay, Medical Director of the TVAMC, officially notified the Plaintiff on January 19, 1996, that she would be detailed to the Ambulatory Care Service at the TVAMC for a period not to exceed thirty (30) days. In that memo, Mr. Clay specifically stated that his decision to detail the Plaintiff was based on the findings and recommendations of the site review team report. Later, on February 6, 1996, Dr. Stanley Kahane sent a memo to Mr. Clay recommending that the

Plaintiff be permanently reassigned from her position of Chief of PM & RS to a staff physician assignment in the Ambulatory Care Service at the TVAMC. In that memo to Mr. Clay, Dr. Kahane also specifically mentioned that the findings and recommendations contained in the site review team report were considered by him in arriving at his recommendation to Mr. Clay. Later that same day, Mr. Clay officially notified the Plaintiff that she would be permanently reassigned from her position of Chief of PM & RS to the reduced position of staff physician in the Ambulatory Care Service at the TVAMC. In that notification memo, Mr. Clay informed the Plaintiff that he no longer had faith in her ability to supervise the PM & RS staff and to ensure that appropriate care would be provided to the veteran patients seeking its service. In making that assessment of the Plaintiff's managerial and leadership abilities, Mr. Clay stated in his memo to the Plaintiff that he based his assessment on "documented evidence" and his personal observation of the Plaintiff. It is clear from the January 19, 1996 memo from Mr. Clay to the Plaintiff as well as the February 6, 1996 memo from Dr. Kahane to Mr. Clay that the "documented evidence" referred to by Mr. Clay in his February 6, 1996 memo to the Plaintiff pertained to the site review report which relied upon the Plaintiff's history of filing EEO complaints against the TVAMC.

In the memorandum opinion, the trial judge specifically found that "the request for the site visit and the site visit itself, began the steps that led to Malladi's detail, to the negative site visit team report, and to her reduction in pay, all of which have no doubt had a serious impact on the terms and conditions of her employment." (App. B, 46a). The trial judge noted in his opinion that the Plaintiff had established a prima facie claim for retaliation under the *McDonnell Douglas* circumstantial evidence analysis.

It is the Plaintiff's position that she provided the trial judge with direct evidence of retaliation; therefore, the De-

fendant should have been required by the trial judge to prove by a preponderance of the evidence that it would have made the same decision to detail and remove the Plaintiff as Chief of PM & RS, even if it had not taken the illegitimate factor (the Plaintiff's prior history of filing EEO complaints against the Defendant) into account.[3]

CONCLUSION

For all the foregoing reasons, the Appellant Malladi respectfully requests that this Honorable Court grant a petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals, reverse the decision of the trial court, and remand this case to the court for further consideration by that trial court.

Respectfully submitted,

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Dated: December 30, 1998

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[3] With the passage of The Civil Rights Act of 1991, specifically 42 U.S.C.S. § 2000e-2(m), once a plaintiff has provided direct evidence that an unlawful employment practice by an employer was motivated by the employee's race, color, religion, sex, or national origin, that liability attaches to that employer regardless of whether the employer can provide evidence that he would have made the same employment decision absent the discriminatory motive. Though the First Circuit Court of Appeals and the Seventh Circuit Court of Appeals have held that the mixed-motive provision of 42 U.S.C.S. § 2000e-2(m) does not apply to Title VII retaliation claims brought under 42 U.S.C.S. § 2000e-3(a), it is the Plaintiff's position that if the mixed-motive provision does apply here that she has established the Defendant's liability through direct evidence of retaliation. See *Tanca v. Nordberg*, 98 F.3d 680 (1st Cir. 1996) and *McNutt v. Board of Trustees of Univ. of Ill.*, 141 F.3d 706 (7th Cir. 1998).

APPENDICES

APPENDIX A

[Filed Jul. 16, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-7027
Non-Argument Calendar

D. C. Docket No. CV-96-T-431-N

VISALAKSHI MALLADI,
Plaintiff-Appellant,

versus

HERSHEL GOBER, in his official capacity as
SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(July 16, 1998)

Before COX, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

We affirm the district court's grant of summary judgment in favor of the defendant in this case based on the thorough and well-reasoned memorandum opinion of the district court filed on December 1, 1997.

AFFIRMED.

APPENDIX B

[Filed Dec. 1, 1997]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 96-T-431-E

VISALAKSHI MALLADI,
Plaintiff,

v.

JESSIE BROWN, in his official capacity as
SECRETARY OF VETERANS AFFAIRS,
Defendant.

MEMORANDUM OPINION

Plaintiff Visalakshi Malladi, who is of "Asian origin from the Indian Sub-Continent," [1] brings this lawsuit charging defendant Secretary of Veterans Affairs (hereinafter referred to as the "VA") with discriminating against her because of her race, sex, and national origin, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, and because of her handicap, in violation of the Rehabilitation Act, 29 U.S.C.A. §§ 791 and 794, and with retaliating against her for engaging in protected activity, in violation of Title VII. Malladi is also seeking review of her grievances under the Administrative Procedures Act (hereinafter referred to as the "APA"), 5 U.S.C.A. §§ 702 and 706. Jurisdiction arises under 42 U.S.C.A.

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[1] Plaintiff's complaint, filed on March 8, 1996, ¶ 3.

§ 2000e-5 (Title VII), 29 U.S.C.A. § 794 (Rehabilitation Act), 5 U.S.C.A. § 702 (APA), and 28 U.S.C.A. § 1331 (general federal question) and 28 U.S.C.A. § 1343 (civil rights). This lawsuit is now before the court on the VA Secretary's motion for summary judgment, filed June 18, 1997. For the reasons that follow, the Secretary's motion will be granted.

However, before turning to the motion, the court is compelled to offer to the bench and bar some special introductory comments about this case. As will be evident from this lengthy memorandum opinion, this lawsuit presents a picture (which is becoming more and more frequent) of an abuse of the law and the judicial process. First, Malladi's case is an abuse of the court. Malladi has submitted to the court scores of claims (as contained in administrative charges and subcharges) under almost every theory she and her attorneys could uncover or imagine under statutory and case law. Surely, Malladi and her attorneys know that she has not been the victim of race, sex, national origin, and handicap discrimination simultaneously for almost every adverse employment decision at the VA. This all-encompassing contention defies common sense. It is apparent that what she and her attorneys have done is to take a kitchen sink approach—that is, to put before the court all conceivable claims, with the hope that the court would sort and sift through them in serach of a colorable one. This trial strategy is grossly unfair to the court and all other litigants who come before it. For, the inordinate amount of time the court has had to spend sorting through Malladi's claims has been time unavailable to analyzing other claims and fashioning relief for other individuals, many of whom may truly have been the victims of serious wrongs. Malladi's attorneys, not the court, have the responsibility of weeding out frivolous and questionable claims. Her attorneys should have presented to the court only those claims which they believe presented colorable allegations of wrongdoings.

They, not the court, should sift through her allegations and determine whether she has been the victim of discrimination and, if so, of what type and for what acts.

The court understands that a person can be a victim of pervasive and multiple types of discrimination. But this understanding has reasonable limits and is not an invitation to abuse. Lawyers have an obligation, just as much as judges, to make sure that these limits are respected. When lawyers fail to meet this obligation they fail to live up to the oath they took as officers of the court. Indeed, courts cannot function as delivers of justice—they cannot give all cases the fair and careful and expeditious consideration each one deserves—when they are burdened with cases such as this one.

Second, Malladi's case is an abuse of the opposing litigant. Malladi and her attorneys have essentially forced the VA Secretary to waste his limited taxpayer-funded resources in the defense of frivolous and marginal claims. Indeed, some of her claims are so lacking in merit that the court must conclude she has, and is, pursuing these out of vindictiveness—that is, she has used, and is using, the legal process as a sword of revenge and harassment. With her almost reflexive filing of boiler-plate administrative charges to any adverse employment action taken against her, she has essentially distorted her work environment into one in which the VA has had to devote itself to responding to her claims, rather than to the real issues of whether she is, in fact, doing a good job and whether she and all other employees are providing services patients need.

Ironically, Malladi's kitchen-sink approach is, in the end, self-defeating. By lumping her frivolous claims with her arguably colorable claims, both she and her lawyers risk losing all credibility with the court. By challenging almost all actions adverse to her under almost every conceivable applicable law, she risks making her entire case seem frivolous. With such a strategy, she risks appearing

before the court as a petty and pesky litigator, rather than a real victim of discrimination who warrants careful and sympathetic consideration.

Finally and most importantly, cases such as Malladi's constitute an abuse of the very laws they seek to invoke. The purpose of laws banning discrimination based on race, sex, national origin, and disability is venerable: to eliminate and redress serious acts of discrimination suffered by employees, both public and private. They were not intended, as Malladi has used them here, to be a generalized grievance process for disgruntled employees. What Malladi does here is essentially to mock the laws. In a sense, therefore, it is Malladi, and not the VA, who is guilty of a gross injustice in violation of these laws.

I. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Pocedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Once the party seeking summary judgment has informed the court of the basis for its motion, the burden shifts to the non-moving party to demonstrate why summary judgment would be inappropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); *see also Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-17 (11th Cir. 1993) (discussing how the responsibilities on the movant and the nonmovant vary depending on whether the legal issues, as to which the facts in question pertain, are ones on which the movant or nonmovant bears the burden of proof at trial). In making its determination, the court must view all evidence and any factual inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986).

II. BACKGROUND

The court finds the relevant and salient background facts to be as follows:

February 1988: Malladi was hired as a staff physiatrist —a physician who specializes in physical medicine, that is, the treatment of illness by way of physical means— by the VA in the Physical Medicine and Rehabilitation Service (PM&RS) at the Veterans Administration Medical Center in Tuskegee, Alabama (TVAMC). Stanley B. Kahane became the chief of staff of TVAMC at approximately the same time.

September 1988: Malladi *was designated as acting* chief of PM&RS.

March 1989: Malladi was appointed chief of PM&RS.

December 24, 1992 to January 11, 1995: Malladi filed seven separate Equal Employment Opportunity admisistrative charges, commonly referred to as EEO charges, alleging that the VA discriminated against her because of her race, sex, national origin, and handicap, and that the VA retaliated against her for engaging in protected activity.

March 30, 1995: The parties settled Malladi's seven pending administrative charges by way of a global settlement agreement.

June 29, 1995: Malladi wrote a letter requesting that the Equal Employment Opportunity Office at the VA reopen the charges underlying the settlement agreement because, she alleged, multiple provisions of the settlement agreement had been breached by the VA.

August 25, 1995: Malladi filed her eighth EEO charge alleging retaliation based on the following: (1) her May 1995 request to hire a staff physiatrist was denied; (2) Kahane's administrative assistant telephoned her while she

was on sick leave at her home to see if she could return to work; and (3) Kahane denied her request to cancel the outpatient rehabilitation clinic and electromyography test.

Fall 1995: The TVAMC management requested a site visit team to conduct a thorough review of PM&RS because of problems it saw in the service resulting from Malladi's refusal to accept decisions of management, failure to cooperate with management, bad relations with subordinate employees, and disputes about workload.

October 23, 1995: The VA issued its ruling on Malladi's request to reopen her underlying claims because of the breach of the settlement agreement, concluding that it had not breached the settlement agreement.

October 30, 1995: Malladi filed her ninth EEO charge alleging retaliation based on the denial of her August 1995 request to hire a staff physiatrist.

November 13, 1995: Malladi appealed the VA's ruling that it had not breached the settlement agreement to the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC").

December 14 and 15, 1995: The site visit team conducted a two-day review of PM&RS.

January 2, 1996: Malladi filed her tenth EEO charge alleging (1) breach of the settlement agreement, and (2) retaliation based on improper treatment by Kahane in that he allegedly shouted at her in front of her subordinates.

January 16, 1996: The site visit team issued its report. The report detailed many problems with PM&RS, including very low employee morale, substantial infighting among employees, minimal evidence of quality improvement initiatives, poor use of the coordinator position, no communication within the service or with the administration, irreconcilable differences between Malladi and the staff, no

evidence of workload validation, no process for downsizing, no prioritization of patients to be seen, and no strategic plan. In addition, the report indicated that Malladi's claims of overwork were unsubstantiated, and there were no data to support Malladi's continual requests for an additional physiatrist. The report also included the following finding:

> "In discussion with the Chief of Staff, Medical Center Director and the Associate Director, a strong concern was expressed regarding the inability of the Medical Center leadership to gain cooperation with the current Chief of PM&RS in resolving issues precipitating the site visit. This concern stems from the recent history of EEO complaints filed by the Chief, PM&RS. Since December of 1992, the Chief, PM&RS has registered a total of 12 EEO complaints against the Director, Chief of Staff, and Associate Director (triad) alleging discrimination on the basis of race, disability and gender. In review of EEO records, the majority of filings stem from the Chief's perceived feeling of discrimination relating to a refusal by triad to provide additional physician staffing to PM&RS. Seven of the complaints have been resolved via a global settlement agreement signed March 30, 1995. The Chief had continued to register complaints to the EEO Commission based on perceived reprisal from the triad in relation to her original complaint. As a result of the continued filing, the members of the triad feel incapacitated in providing the Chief with adequate direction and assistance in management of her service. In discussion with Dr. Torrado, the Staff Assistant for EEO, this continued filing has also burdened the EEO system at the hospital and resulted in excessive provision of resources by the EEO staff to continually review Dr. Malladi's complaints." [2]

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[2] Defendant's exhibit D, attachment 6, at 3.

On the basis of the information it collected, the site visit team recommended, among other things, that Malladi be removed from her position as chief of PM&RS, and reassigned to another position in the hospital outside of PM&RS.[3]

January 19, 1996: Malladi received a memorandum from Jimmie L. Clay, the medical center director, informing her that she was being detailed to Ambulatory Care Service for period not to exceed 30 days.

January 22, 1996: Malladi filed her eleventh EEO charge alleging retaliation and discrimination because of her race, sex, national origin, and handicap based on statements made by her subordinate employees to the EEO counselor conducting the investigation of her ninth EEO charge.

February 6, 1996: Kahane recommended to Clay that Malladi be permanently reassigned from her position as chief of PM&RS to a staff physician position in Ambulatory Care Service because he felt: (1) Malladi's leadership was inadequate and had caused a rift within the service; (2) Malladi's inadequate supervision of physician extender staff may jeopardize patients; (3) there was substantial infighting among the PM&RS staff; and (4) Malladi failed to work cooperatively with the TVAMC management. This recommendation relied explicitly on the findings and recommendations of the site visit team. Clay informed Malladi of her permanent reassignment, to be effective February 18, 1996.

February 14, 1996: Malladi filed her twelfth EEO charge alleging retaliation and dicrimination because of her race, sex, national origin, and handicap based on the following: (1) Kahane treated her inappropriatey relative to her management of subordinate employees in two incidents in her service involving patient abuse and finan-

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[3] *Id.* at 5-6.

cial dealing with a patient; (2) Clay made unreasonable delays in responding to her written request for an EEO counselor's report; (3) there was an inappropriate referral of her EEO charge to the VA central office for procedural review; and (4) there was an unfair and inappropriate request for a site visit.

February 15, 1996: Kahane gave Malladi a proposed letter of admonishment for her actions in the management of subordinate employees in two incidents in her service involving patient abuse and financial dealings with a patient.

March 4, 1996: Clay gave Malladi a letter of admonishment based on the proposed admonishment dated February 15, 1996.

March 8, 1996: This lawsuit was filed.

March 12, 1996: Pursuant to the VA's internal grievance procedures, Malladi filed formal grievances with respect to her permanent reassignment to the ambulatory care service and her letter of admonishment for her handling of patient/employee matters.

March 28, 1996: Malladi filed her thirteenth EEO charge alleging retaliation and discrimination because of her race, sex, national origin, and handicap based on the following: (1) on January 19, 1996, she was detailed out of PM&RS to Ambulatory Care Service; (2) the PM&RS staff was informed that she had been detailed to another service and removed as chief of PM&RS before she was notified; (3) the site visit team's report was biased and unfair and targeted her as chief of PM&RS and as a physiatrist; (4) her reassignment to a staff physician in Ambulatory Care Service reduced her pay by $8,250, which represented the special pay for being service chief and not a reduction in base pay; (5) Kahane authorized her former subordinate staff physiatrist, who is board eligible, to countersign her consultations, while she is

board certified; (6) Clay inappropriately referred her EEO charges to the VA central office for procedural review; (7) Kahane caused the keys to the chief of PM&RS office and government scooter to be taken from her on the same day as her detail; and (8) Kahane gave her a proposed memorandum of admonishment and the subsequent memorandum of admonishment.

April 17, 1996: Pursuant to the VA's internal grievance procedures, Malladi filed a formal grievance with respect to the VA's failure to follow rules in giving her an "unsatisfactory" rating on March 13, 1996.

May 1, 1996: Larry R. Deal, the director of the Atlanta Network of VA facilities, sent Malladi a letter informing her that her April 17, 1996, grievance was excluded from processing because "[o]ur VA Manual MP-5, Part II, Chapter 8, Section B, paragraph 14(h) specifically excludes complaints arising from dissatisfaction with the proficiency rating from coverage under the grievance procedure." He indicated that although Malladi made a specific point of taking issue with the "procedure used in the proficiency evaluation, . . . it is clear that your complaint goes to the proficiency rating itself and is therefore excluded from coverage."

May 14, 1996: Shirley Cooper, the grievance examiner appointed by the VA, issued her report of findings and recommendations regarding Malladi's grievances with respect to her permanent reassignment to the ambulatory care service and her letter of admonishment for her handling of patient/employee matters. Cooper concluded that there was ample evidence to support both actions by TVAMC and that Malladi's grievances were without merit.

October 10, 1996: Malladi's complaint was amended to include the allegations in her thirteenth EEO charge.

December 18, 1996: The EEOC issued its ruling on Malladi's request to reopen her underlying claims because

of the breach of the settlment agreement,[4] concluding that the VA had breached ¶ 2.d of the settlement agreement with respect to providing Malladi with management training. As a remedy, the EEOC did not order that Malladi's underlying complaints be reopened, but that the VA should comply with ¶ 2.d. The EEOC also concluded that it needed more evidence to determine if the VA had breached ¶ 2.e with respect to providing good faith consideration for Malladi to serve as acting chief of staff in the chief of staff's absence. The EEOC ordered that more evidence be provided with respect to ¶ 2.e, and has not entered another ruling.

III. DISCUSSION

Malladi asserts many and varied claims of discrimination in this case, in addition to seeking review of her grievances under the APA. She alleges claims of disparate treatment because of her race, sex, handicap, and national origin, and retaliation for engaging in protected activity, all of which are based on thirteen separate EEO charges with multiple factual bases. The court's discussion of the issues begins with consideration of whether there was a breach of the global settlement agreement into which the parties entered on March 30, 1995, which governs the claims made in Malladi's first seven EEO charges, and then continues on to a discussion of her remaining EEO charges, and the review of her grievances under the APA.

A. Breach of the Settlement Agreement

Malladi alleges that her first seven EEO charges, which were settled by way of a global settlement agreement entered into by the parties on March 30, 1995,[5] should be reopened and litigated because the VA breached the agreement. She bases her argument on ¶ 4 of the agreement,

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[4] Defendant's exhibit W.

[5] Defendant's exhibit U.

which states, in relevant part, that the "VA agrees that, should it fail to comply with any of the terms set forth herein for reasons not attributable to acts or conduct of the complainant, it will reopen the complaint for further processing at the point in the process where processing ceased as a result of this agreement." Malladi alleges that the VA breached the settlement agreement by: (1) not providing her with management training in accordance with ¶ 2.d;[6] (2) not providing her with the opportunity to serve as chief of staff in accordance with ¶ 2.e;[7] (3) failing to pay her attorney fees in a timely fashion in accordance with ¶ 2.g;[8] failing to provide a non-discriminatory environment in accordance with ¶ 2.h;[9] and (5) not sending her a confirmation letter of the removal of her "appraisal of applicant" form in accordance with ¶ 2.i.[10]

Settlement of EEO charges by a settlement agreement results in a contract between the plaintiff and the defend-

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6 Paragraph 2.d of the setlement agreement provides that the VA shall, "[i]n good faith, provide Complainant with an opportunity for management training."

7 Paragraph 2.e of the settlement agreement provides that the VA will "[i]nsure that Complainant receives due consideration for any opportunity to fulfill the Acting Chief of Staff's position at Tuskegee VAMC should the need for that position arise;"

9 Paragraph 2.h of the settlement agreement provides that the VA will "[p]ay Complainant's attorney fees in the amount of $9,000.00."

9 Paragraph 2.h of the settlement agreement provides that the VA shall "[p]rovide the Complainant with a fair and equitable work environment free from harassment or any other discrimination based on race, color, religion, sex, national origin, age, handicapping condition or reprisal for filing these complaints."

10 Paragraph 2.i of the settlement agreemnt provides that the VA will "[r]emove the 'appraisal of applicant' dated 11-21-92 from the selection file for the Chief of Staff position at Lake City, Florida, VAMC."

ant. This contract is thus enforced according to the rules of contract law. For there to be a breach of the settlement agrement that is sufficient to discharge a party from her obligations under the contract, and that would allow her to open up the underlying claims for further adjudication, the breach must be "material." *See Ferrell v. Secretary of Defense,* 662 F.2d 1179, 1181 (5th Cir. 1981). "According to the original Restatement of Contracts, if the failure of one party to perform part of a contract is so material that it results in the other party not receiving substantially what he bargained for, the duty of the injured party is discharged and [she] is, thereby, wholly excused from carrying out [her] undertaking. *See* Restatement of Contracts §§ 274, 397 (1932). If, on the other hand, the failure to perform is not material, the injured party retains [her] duty to render [her] performance. *See* id. § 274 (1). There is still a breach of contract, but the innocent party must recoup his losses, if any, for such an immaterial breach through an action for damages or one of the other procedural devices designed for that purpose." *Ferrell,* 662 F.2d at 1181.

A non-material breach, although possibly causing some damage to the plaintiff, is not sufficient to discharge Malladi from her obligations. Not every breach of a contract amounts to a material breach. A material breach occurs only when an injured pary has sustained a substantial injury by the breach. The Restatement (Second) of Contracts § 241 (1979) suggests five criteria to consider in assessing whether a breach of contract is material. The criteria involve considering: (1) the extent to which the injured party will be deprived of the benefit which she reasonably expected; (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which she will be deprived; (3) the extent to which the breaching party will suffer forfeiture; (4) the likelihood that the breaching party will cure; and (5) the

extent to which the behavior of the breaching party comports with standards of good faith and fair dealing.[11]

The breaches that Malladi alleges of ¶ 2.g, with respect to paying her attorney fees, and ¶ 2.i, with respect to removing the "appraisal of applicant" from her application file, do not amount to breaches of the agreement at all because the VA has performed its obligations under both provisions. The evidence with respect to ¶ 2.i is undisputed that the "appraisal of applicant" was removed from Malladi's file.[12] Malladi contends that the VA did not send her a confirmation letter to let her know that this had happened. First, sending Malladi a confirmation letter was not a requirement according to the terms of the agreement, and thus not sending one is not a breach of the agreement. Even if sending a confirmation letter was a requirement, it is seriously doubtful that not sending one would amount to a material breach because Malladi would still have received essentially what she bargained for. With respect to ¶ 2.g, the evidence is also undisputed that the VA has paid her attorney fees as required by the agreement.[13] There was a seven-month delay in the payment of the money, but it was paid. If any remedy is appropriate for this delay, it is a claim for any monetary damage Malladi may have suffered, but not a release from her obligation under the agreement.

The breach that Malladi alleges of ¶ 2.e, with respect to considering her for the opportunity to serve as acting chief of staff, also does not amount to a material breach

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11 "[A] breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow [her] to recover damages based on all [her] remaining rights to performance." Restatement (Second) of Contracts § 243(4) (1979).

12 Defendant's exhibit D, ¶ 7.

13 Plaintiff's exhibit B, at 519.

of the contract. The uncontradicted evidence indicates that since the date of the settlement agreement, there has been no occasion on which there was a need for an acting chief of staff that required the consideration of service chiefs like Malladi.[14] There was a number of instances in which there was an acting chief of staff after the parties entered into the settlement agreement, but they were all filled by the two deputy chiefs of staff, which appears to be the normal procedure followed by the VA.[15] Only in the absence of the deputies did the VA consider the service chiefs to fill in. Thus, there is no indication that the VA did not do what it agreed to do, which was give Malladi good faith consideration should the need arise for an acting chief of staff. Therefore, there does not appear to have been any breach of ¶ 2.e, much less a material breach.

The breach that Malladi alleges of ¶ 2.d, with respect to the VA providing her with the opportunity for management training, also does not amount to a material breach. The evidence is clear that Malladi has not attended any management training.[16] She was presented with information about two different management training sessions, but this information was provided as part of the normal circulation of information the VA makes to all its service chiefs;[17] no special effort was made to give special notice to Malladi. This may well constitute a breach of the agreement, but it definitely does not warrant the penalties that

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[14] Malladi alleges that a Dr. Warren, who is one of the other service chiefs, served as the acting chief of staff, and that she was not considered at that time. Plaintiff's exhibit B, at 522-24. The evidence indicates, however, that his service occurred before the parties entered into the global settlement agreement requiring Malladi's consideration for the position. Defendant's exhibit II, ¶ 4.

[15] Defendant's exhibit C, ¶ 18 and attachment 18.

[16] Plantiff's exhibit A, ¶ 56.

[17] Defendant's exhibit X, ¶ 2 and attachment 1.

go along with a finding of a material breach; this breach can be easily cured by compelling the VA to fulfill its obligation. In its ruling, the EEOC determined that there had been a breach of the agreement with respect to this paragraph, and ordered that the VA comply with its obligation. The court agrees with this finding and order by the EEOC and finds that a breach of this sort does not amount to a material breach calling for a release of Malladi from her obligations. Malladi may well be entitled to damages for any harm caused her by the failure to provide management training, or to an order for specific performance, but that is best pursued in a separate suit based on the contract.

With respect to all the foregoing allegations, Malladi is not without relief. She can always bring a separate suit for enforcement of the contract or for damages for any breach. This is the appropriate procedure for redressing a breach of contract, which is what Malladi has created with the VA by entering into a settlement agreement.

Finally, the breach alleged by Malladi of ¶ 2.h, with respect to providing her with a non-discriminatory work environment, does not justify a release of her obligations under the settlement agreement. In this case, as discussed below, the court finds that Malladi has failed to state a claim on any of her subsequent allegations of discrimination, so there has been no breach of this contract term. Moreover, even if Malladi had successfully alleged a subsequent allegation of discrimination, contract terms, such as ¶ 2.h, cannot form the basis of a release because of several difficulties they pose. First, as a practical matter, the use of such a contractual term creates an on-going threat of invalidation of the contract for one party that never ends, and never allows for a complete execution of the contract. The practical difficulty is that the contract is never certain, and the underlying claims are always subject to being reopened and litigated. The court cannot continually re-

visit these claims in perpetuity with the ever-present possibility that it is going to have to litigate them.

Second, a contract term such as this is generally disfavored in contract law because it allows one party to gain unfair advantage by using as consideration a legal obligation it already has and cannot escape even in the absence of an additional contract. *In re Lloyd, Carr & Co.*, 617 F.2d 882, 890 (1st Cir. 1980); *see also Start v. Apple Computer, Inc.*, Civ. no. C95-20149 PVT, 1996 WL 161630, at *3 (N.D. Cal. March 29, 1996) ("Apple's promise not to discriminate is a preexisting legal obligation. Apple is already legally obligated to fulfill a duty not to discriminate under federal and state law. . . . As such, Start is legally entitled to nondiscriminatory, nonretaliatory treatment even in the absence of a written or oral contract. Further, Apple suffers no additional detriment in performing its legal obligation. Accordingly, Apple's promise to perform its preexisting duty is not legal consideration, and Start's breach of contract claim under her first theory fails."). The reasoning is that the party under the legal obligation can take unfair advantage of the other party by getting additional benefit for doing something it is already obliged to do by law. *See In re Lloyd*, 617 F.2d at 890 ("The policy underlying this rule is to discourage parties under [preexisting legal] duty from using the threat of nonperformance to extort greater compensation for doing only that which they were already obligated to do."). A term like this is also troublesome to the court because it imposes additional punishment on the party under the legal obligation for breaching its duty, when the law has already directed the redress that is appropriate. Such an arrangement makes the additional contract seem unnecessary and unfair.

Finally, the law is not silent on these matters, and directs the process for dealing with claims of discrimination arising after parties have entered into a settlement

agreement. In 29 C.F.R. § 1614.504(c), which covers compliance with settlement agreements and the processes for dealing with non-compliance, the regulations provide, in relevant part, that "[a]llegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate charges under § 1614.104 or § 1614.204, as appropriate, rather than under this section." Malladi has filed individual EEO charges for all the discrimination she alleges she has suffered. The effect of allowing her to bring both EEO charges and to seek release from her obligations under the settlement agreement is to allow her to double-dip—that is, will allow her to get double benefit for any particular act of discrimination. The court cannot allow her to receive this double benefit.

Looking at the agreement as a whole, Malladi did receive the benefit she expected under ¶¶ 2.a, 2.b, 2.c, 2.e, 2.f, 2.g, and 2.i. There may have been a breach of ¶ 2.d, but the appropriate relief for this breach is an action for damages or specific performance, and not release from all obligations under the contract. Finally, the court does not find any violations of ¶ 2.h, but even if it did, such violations can be redressed by the existing anti-discrimination law, and the court will not sanction a view of this term that allows for perpetual review of the contract, unfair advantages to the parties to the contract, and double-dipping for one of the parties. Considering the foregoing, the court finds that there has not been a material breach of the settlement agreement, and that Malladi is not entitled to be released from her obligations under that contract and to litigate the claims resolved in the settlement agreement. Consequently, any claims Malladi has with respect to her first seven EEO charges will be dismissed.

B. Claims of Disparate Treatment Based on Race, Sex, or National Origin [18]

Title VII prohibits discrimination in employment on the basis of race, sex, or national origin. 42 U.S.C.A. § 2000e-2(a)(1). In this case, Malladi does not attempt to show that she was discriminated against by way of direct evidence, but rather by way of circumstantial evidence. In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973), the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases" based on circumstantial evidence. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506, 113 S. Ct. 2742, 2746 (1993).

Under the *McDonnell Douglas* approach, a plaintiff has the initial burden of establishing a prima-facie case of unlawful discrimination by a preponderance of evidence. *St. Mary's,* 509 U.S. at 506, 113 S. Ct. at 2746-47. A prima-facie case requires "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358, 97 S. Ct. 1843, 1866 (1977). The prima-facie case of disparate treatment based on race, sex, or national origin is established when an employee shows that an employer simply treats some people less favorably than others because of their race, sex, or national origin. *United States v. Crosby,* 59 F.3d 1133, 1135 (11th Cir. 1995) (*citing Armstrong v. Flowers Hosp., Inc.,* 33 F.3d 1308, 1313 (11th Cir. 1994)).

Under the Title VII framework set forth in *McDonnell Douglas,* the "[e]stablishment of the prima facie case in

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18 With respect to all of Malladi's claims of disparate treatment because of her race, sex, or national origin, she also alleges that she received disparate treatment because of her handicap. The handicap claims are discussed separately at § III.D, *infra.*

effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). The burden of production then shifts to the defendant to show that the adverse employment actions were taken for a "legitimate, nondiscriminatory reason." *Burdine,* 450 U.S. at 254, 101 S. Ct. at 1094. As the Supreme Court has explained, the defendant's burden is one of production only, not persuasion. *St. Mary's,* 509 U.S. at 510-11, 113 S. Ct. at 2749. Once a defendant has artitculated a nondiscriminatory reason, the presumption in favor of the plaintiff has been rebutted and disappears. *Id.* The disappearance of the presumption, however, does not compel summary judgment in favor of a Title VII defendant.[19] The "ultimate question" remains the same: whether the plaintiff can persuade the trier of fact that she has been the victim of intentional discrimination. *Id.* at 508, 113 S. Ct. at 2747-48.

"Where the defendant meets this burden, the plaintiff has the opportunity to domonstrate that the defendant's articulated reason for the adverse employment action is a mere pretext for discrimination." *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997) (*citing McDonnell Douglas,* 411 U.S. at 804, 93 S. Ct. at 1825). "This demonstration merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff." *Holifield,* 115 F.3d at 1565.

In the summary judgment context, "[t]he burden to avoid summary judgment is not to show by a preponderance of the evidence that the reasons stated were pretext. . . . The only issue to be considered by the judge at summary judgment is whether the plaintiff's evidence has placed material facts [relating to issue of pretext] at

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19 Rather, rebutting the presumption saves the defendant from summary judgment in favor of the plaintiff.

issue." *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913, 921 (11th Cir. 1994).

1. Statements by Subordinate Employees

In her eleventh EEO charge, Malladi claims disparte treatment because of her race, sex, or national origin based on comments made by her subordinate employees to the EEO counselor investigating her ninth EEO charge. Malladi alleges that the employees' statements were inaccurate with respect to her workload and interpersonal skills, and that they had the effect of changing her work environment and ultimately leading to her reassignment. For this claim, Malladi is unable to make out the prima-facie case of disparate treatment.

For any discriminatory act to be actionable under Title VII, it must have been perpetrated by an employer or his agent. 42 U.S.C.A. § 2000e(b). Even construing the term 'agent' liberally, such a person must still be endowed with the traditional rights of the employer, such as the right to hire and fire the employee. *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir. 1994) ("Under this liberal construction, immediate supervisors are Employers when delegated the employer's traditional rights, such as hiring and firing") (emphasis removed); *see also Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986) (construing the term employer to include immediate supervisors only when they "participated in the decision-making process that forms the basis of the discrimination"). It is therefore clear that "[t]here can be no liability under Title VII . . . 'for the actions of mere co-workers' " *Garcia*, 28 F.3d at 451 (quoting *Harvey v. Blake*, 913 F.2d 226, 228 (5th Cir. 1990)).

In this case, the employees, who Malladi alleges have perpetrated discrimination against her, do not fall within the definition of employer under Title VII. These employees do not perform any traditional employer func-

tions, and, in fact, perform no functions that can impact the terms and conditions of Malladi's employment; they are her subordinates. In addition, Malladi does not allege that the VA in any way acted through these employees to perpetrate its discriminatory end, but only that their comments were significant in a change in her work environment and were considered in the final actions by the VA that led to her reassignment. Even if this were true, it would fail to show a discriminatory motive at the time the employees' comments were made, thus eliminating any inference that the actions were motivated by Malladi's race, sex, or national origin. Because Malladi cannot state a prima-facie case on this claim, judgment will be entered against her on it.

2. Failure to Allege a Similarly-Situated Non-Minority Person

The remainder of Malladi's disparate-treatment claims based on race, sex, and national origin are without merit, first, because the non-minority person whom she names for comparison is not similarly-situated, or, second, because she fails even to name a person for comparison.

a. Inadequate Person Alleged

For a number of her claims of disparate treatment, Malladi has alleged a person to whom she says she is similarly-situated. Under the prevailing standards, however, these individuals do not qualify. To allege disparate treatment, Malladi must show that she was treated less favorably than a similarly-situated non-minority person. *Holifield,* 115 F.3d at 1562 (*citing Coutu v. Martin City Bd. of City Comm'rs,* 47 F.3d 1068, 1073 (11th Cir. 1995)). "To make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show the [she] and the employees are similarly situated in all relevant respects." *Holifield,* 115 F.3d at 1562 (*citing Smith v. Stratus Computers, Inc.,* 40 F.3d 11, 17

(1st Cir. 1994); *Mitchell v. Toledo Hospital,* 964 F.2d 577, 583 (6th Cir. 1992) ("[T]o be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."); *Smith v. Monsanto Chemical Co.,* 770 F.2d 719, 723 (8th Cir. 1985)). "In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Holifield,* 115 F.3d at 1562 (*citing Williams v. Ford Motor Co.,* 14 F.3d 1305, 1309 (8th Cir. 1994)). The simple allegation that there was someone else, without an adequate showing that she is similarly-situated in all relevant respects, fails to make out the prima-facie case.

i.

In the first allegation in her twelfth EEO charge, Malladi claims that she received disparate treatment because of her race, sex, or national origin as a result of inappropriate treatment by Kahane relating to her management of subordinate employees in two incidents in her service involving patient abuse and financial dealings with a patient. For this claim, Malladi has failed to make a showing that she was treated less favorably than a smilarly-situated non-minority person.

Malladi alleges that she received less favorable treatment than Associate Medical Center Director Rollins, who knew about the financial dealings, but against whom no action was taken. The comparison of Malladi with Rollins fails because the evidence produced shows that they were not similarly situated. Rollins does not fall in the management structure above the employees in question, where he

would have had an obligation to investigate the wrongdoing alleged against them, nor below Kahane, where he would have an obligation to report his knowledge to someone who was not his boss.[20] Malladi, on the other hand, fills a position directly above the employees, whose actions she is responsible for supervising, and directly below Kahane, who, as the chief of staff, should be informed by her of such events.[21] Considering the differences in their positions, one could not reasonably expect that Rollins would be treated the same as Malladi. The mere fact that he knew about the events does not suggest that he should be treated similarly to Malladi for failing to act on the information because his responsibilities at the hospital were different.

Rollins and Malladi are not similarly situated, and Malladi has not alleged any evidence about other similarly-situated persons being treated more favorably than her. Because Malladi cannot make out the prima-facie case for disparate treatment, this claim is without merit.

ii.

In the fourth allegation in her twelfth EEO charge, Malladi claims that she received disparate treatment because of her race, sex, or national origin as a result of an unfair and inappropriate request for a site visit. The focus in this claim is on the VA's request for the site visit, not its reaction to or use of the findings from the visit; these latter issues are raised in Malladi's thirteenth EEO charge. For this claim, Malladi has not presented any clear evidence about who, if anyone, was in a similar position to her, and was having similar difficulties to those alleged against her, but was not subjected to a site visit.[22]

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20 Defendant's exhibit KK, ¶ 6.

21 Defendant's exhbit C, ¶¶ 2 and 22 and attachment 21.

22 Admittedly, as to this claim, Malladi points to two other service chiefs who received 'recommendations' after a JCAHO survey,

It is alleged by the VA that the site visit was requested because of Malladi's (1) refusal to accept management decisions, (2) failure to cooperate with management, (3) bad relations with subordinates, and (4) workload disputes.[23]

The only person mentioned who appears to bear any resemblance to Malladi is Thomas E. Kondrak, Chief of Recreation Service. Kondrak had a complaint lodged against him on May 27, 1993, by a number of his em-

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but for whom no site visit was requested. The JACHO survey is an annual survey that looks at the higher management structure of the hospital. As an initial matter, one of the recommendations that was given to one of the service chiefs was later reversed by JCAHO, so this undermines the basis on which Malladi alleges she was similarly situated to him.

Second, Malladi has made no showing that the JCAHO survey was at all relevant to the VA's decison to request a site visit for her; the VA claims that it was not. Third, the court fails to see how the JCAHO survey was relevant to the issue of the request for a site visit. The site visit is clearly a more in-depth analysis of a service that could easily examine issues not addressed in the more general JCAHO survey. At the very minimum, a favorable rating in the JCAHO survey is by no means an immunization against a site visit to look at issues the survey does not address. Finally, the remaining evidence presented about the person to whom Malladi compares herself is not sufficient to determine if he is similarly-situated. Malladi received no recommendation for improvement in the JCAHO survey; whereas he did. The court also has no idea what issues were identified for improvement for the other person's service, so no analysis can be made of how the two compare. Considering the foregoing, the remaining individual cannot be considered adequate person to whom Malladi can be compared.

As best the court can tell, the assertions about these two individuals appear to boil down to Malladi's belief that she should not have had a site visit when she did not get a recommendation for improvement in the JCAHO survey, but this is not actionable as disparate impact in federal court.

[23] Defendant's exhibit D, ¶ 8.

ployees who sought his removal. [24] However, a site visit was ordered upon this complaint and other issues relating to the operation of his service and its interaction with other services, and it took place on July 1 and 2, 1993.[25] If anything, this evidence shows that Malladi was treated the same as a similarly-situated non-minority person, not less favorably.

In her reply brief, Malladi states that the comparison with Kondrak is meant to show that he "received significant employee complaints about his conduct, and he remained in his position." [26] Perhaps this is true, but it is inappropriate to this charge, because this charge is based on the request for a site visit, not the VA's reaction to or use of the findings from the visit. With regard to the request for a site visit, Malladi was treated the same as the only similarly-situated person identified. Therefore, Malladi cannot make out the prima-facie case for this claim, and it is thus without merit.

iii.

In the first, third, and fourth allegations in her thirteenth EEO charge, Malladi claims that she received disparate treatment because of her race, sex, or national origin as a result of her being detailed out of PM&RS to Ambulatory Care Service on January 19, 1996; the site visit team's report being biased and unfair and targeting Dr. Malladi as the chief of PM&RS and as a physiatrist; and a reduction in her pay for her reassignment to a staff physician position in Ambulatory Care Service, which was not a reduction in base pay, but the loss of an increase given to her for serving as a service chief. Malladi at-

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[24] Defendant's exhibit LL, attached exhibit C.

[25] Defendant's exhibit LL, ¶ 6 and attached exhibit D.

[26] Plantiff's reply brief in opposition to the defendant's motion for summary judgment, filed August 18, 1997, at 7.

tempts to compare her treatment in these matters to Kondrak, but his situation is not sufficiently similar to make an adequate comparison.

As discussed in the previous section, Kondrak had complaints registered against him by his subordinate employees, and had a site visit conducted of his service. When the site visit team reviewed his service, however, it gave some suggestions for improvement, but did not recommend that he be detailed from his service chief position to another job within the hospital.[27] In addition, there is no indication that the site visit was called for the same reasons, which makes it impossible to determine if Kondrak and Malladi are similarly situated. In light of these facts, and in the absence of more evidence, this is not enough. The simple fact, by itself, that Kondrak had a site visit will not suffice. With the evidence Malladi has presented, different treatement of the two could easily be expected from the VA, and thus she cannot make out a prima-facie case of disparate treatment. Consequently, these claims are without merit.

The court finds it appropriate to add a point of admonishment here for Malladi. In her reply brief, while attempting to demonstrate the similarities between herself and Kondrak, Malladi quotes phrases from Kondrak's site visit team report out of context and thus gives the wrong impression of the conclusions the site visit team reached. In her brief, Malladi indicates that the site visit team made reference to the "[l]ack of a working environment" in Kondrak's service,[28] when the report, in its entirety, identifies a "[l]ack of a working environment that empowers employees to be creative in the delivery of direct patient

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27 Defendant's exhibit LL, ¶ 6 and attached exhibit D.

28 Plaintiff's reply brief in opposition to defendant's motion for summary judgment, filed August 18, 1997, at 7.

care programs." [29] This is a substantially narrower criticism than Malladi attempts to suggest. Malladi also points to the "poor working relationship" between Kondrak and another service chief,[30] but neglects to mention that the substantial majority of the criticisms about the "poor working relationship" are directed at the other service chief and not Kondrak.[31] If this is the approach Malladi needs to take to draw the comparison between herself and Kondrak, the court is even more convinced of the lack of actual evidence of the similarity.

iv.

In the second and seventh allegations in her thirteenth EEO charge, Malladi claims that she received disparate treatment because of her race, sex, or national origin, first, as a result of a meeting held by Clay and Kahane in which they informed the PM&RS staff that she had been detailed to another service before Malladi herself was notified, and, second, as a result of Kahane's actions that caused the keys to the chief of PM&RS office and government scooter to be taken from Malladi on January 19, 1996, the same day she Malladi was detailed. Malladi alleges that there was a quality control manager, named Jeff Reiter, who was detailed, whose staff was not informed beforehand, and whose keys were not taken away so quickly, but this is all the information she provides. Malladi indicated that she did not know the circumstances surrounding the informing of Reiter's staff or his detail,[32] and specifically, that she had no idea if Reiter was out sick at the time his staff was to be informed,[33] like Malladi was. Malladi also fails to

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29 Defendant's exhibit LL, attached exhibit D.

30 Plaintiff reply brief in opposition, at 7.

31 Defendant's exhibit LL, attached exhibit D.

32 Plaintiff's exhibit B, at 702-04.

33 *Id.* at 703-05.

allege adequate information to help the court compare Malladi to Reiter with respect to the taking of her keys. The court has no idea where Reiter fell in the management structure, who was responsible for informing his staff of his detail, or who was responsible for taking away his keys. Without more information, Reiter cannot qualify as a similarly-situated person adequate to serve as a person to whom Malladi can be compared. This claim is therefore meritless.

v.

In the fifth allegation in her thirteenth EEO charge, Malladi claims that she received disparate treatment because of her race, sex, or national origin as a result of Kahane's authorizing Malladi's former suborinate staff physiatrist to countersign her consultations, contrary to medical staff by-laws. Malladi alleges that a Dr. Pat, who was a neurologist who also did some work in surgery, was not required to have his consultations countersigned in surgery.[34] Malladi's own testimony indicates, however, that there was no other neurologist who worked in surgery who could countersign his consultations; he was the only neurologist working there.[35] Dr. Pat is, therefore, not an adequate person to whom Malladi can be compared. Beyond Dr. Pat, Malladi does not indicate any other persons who were in a similar situation to hers—that is, working in a service where they were not assigned, but had clinical licensing to practice in the area of medicine. In the absence of more information, this claim is meritless.

b. No Person Alleged

Malladi also has a number of claims where she does not name any other person to whom she can be compared. These claims are: the second and third allegations in her

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[34] Plaintiff's exhibit B, at 720-26.

[35] *Id.*

twelfth EEO charge, where Malladi claims that Clay made unreasonable delays in responding to Malladi's written request for an EEO counselor's report, and that there was an inappropriate referral on November 7, 1995, of her charges to the VA Central Office for procedural review; the sixth allegation in her thirteenth EEO charge, where Malladi also alleges that Clay inappropriately referred EEO cases filed by Malladi since August 1995, including January 2 and 22, 1996, for procedural review; and the eighth allegation of her thirteenth EEO charge, where Kahane gave Malladi a proposed memorandum of admonishment on February 16, 1996, and a subsequent memorandum or admonishment.

For all of these claims, Malladi has failed to allege any person who is similarly-situated to herself. In order to make out the prima-facie case of disparate treatment, Malladi must make this showing, or the court has no adequate person to whom it can compare her to see if she received disparate treatment. Because she has failed to allege such a person, these claims are meritless.

C. Claims of Disparate Treatment Based on Handicap

In each of the claims where Malladi alleges disparate treatment because of her race, sex, or national origin, Malladi also alleges that she received disparate treatment because of her handicap, in violation of the Rehabilitation Act.[36] In evaluating some claims of disability discrimination that are supported by circumstantial evidence, as Malladi's claims are, the court uses the burden-shifting framework set forth in *McDonnell Douglas*, and the cases

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[36] 29 U.S.C.A. § 794(a) provdes, in relevant part, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discriminaton under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

that follow it, as an analytical guide.[37] *Heilweil v. Mount Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994); *see supra* § III.B. The first stage of the framework requires that Malladi come forward and make out the prima-facie case of disparate treatment. To make out a prima-facie case of disparate treatment under the Rehabilitation Act, Malladi must show: (1) she is a "disabled person" under the Act; (2) she is "otherwise qualified" to perform her job; (3) she was treated differently from a similarly situated non-disabled person; and (4) her employer is a recipient of federal financial assistance. *Maddox v. University of Tennessee*, 62 F.3d 843, 846 (6th Cir. 1995), *see also Heilweil*, 32 F.3d at 722. Once Malladi has made out the prima-facie case, this creates a presumption that she suffered disparate treatment and shifts the burden to the VA Secretary.

In the second stage of the framework, the VA can defeat the presumption of discrimination by coming forward with a legitimate, non-discriminatory reason for the actions it took. The burden for the VA Secretary is one

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[37] There is some uncertainty in the case law as to the types of disability claims to which the burden-shifting framework should be applied under the Rehabilitation Act or the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213. For instance, where an employer admits to having taken an employee's disability into consideration in reaching an adverse decision, application of the framework does not make much sense. Nonetheless, it appears clear that the framework can be used for cases in which the employer has disclaimed any consideration of the employee's disability. *See, e.g., Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184-85 (6th Cir. 1996) ("A *McDonnell Douglas* burden-shifting type analysis will, however, be appropriate in some disability discrimination cases. In cases in which the plaintiff has no direct evidence of discrimination and the employer disclaims reliance on the plaintiff's disability, the plaintiff may attempt to establish his or her claim indirectly through the burden shifting method borrowed from *McDonnell Douglas* by establishing a prima facie case of discrimination and shifting the burden to the employer to offer a legitimate, nondiscriminatory reason for its action.").

of production only, and not persuasion. Once the Secretary has presented this evidence, the presumption disappears, and the burden shifts back to Malladi to show that the VA Secretary's reason is a pretext for discrimination and that she was truly the victim of disparate treatment, which is the burden borne by Malladi at all stages.

Elements one, two, and four of the prima-facie case are not disputed by the VA Secretary. The Secretary does not contest that Malladi is a handicapped or disabled person under the Act, that she is "otherwise qualified," or that her employer is a recipient of federal financial assistance.

The VA Secretary contends that there are only two allegations made by Malladi in all of her EEO charges where there is even a question that Malladi received disparate treatment because of her disability—Kahane's completion of her "appraisal of applicant" form (as alleged in her first EEO charge) and the request for the return of the keys to the government scooter (as alleged in her thirteenth EEO charge). Although there are numerous other allegations in Malladi's first, eleventh, twelfth, and thirteenth EEO charges, she does not contend in any of her responses to the motion for summary judgment that any of the others raise issues where Malladi was discriminated against because of her disability. The court, therefore, must conclude that Malladi cannot make out her prima-facie of discrimination under the Rehabilitation Act, and all such claims are meritless.

As for the allegation that the VA discriminated against Malladi because of her disability by Kahane's completion of her "appraisal of applicant" form, that allegation is covered by the settlement agreement entered into by the parties on March 30, 1995. The court has already determined that this claim must be dismissed because there was no material breach of that agreement.

Malladi's claim regarding the return of the keys to the government scooter is frivolous. The uncontradicted evi-

dence shows that Malladi returned the key to her scooter along with her other keys when she was detailed from PM&RS on a Friday, and that the following Monday, when she requested that the key be returned to her, it was returned immediately. There is no evidence that the key to the scooter was asked for specifically or that it was asked for in anything but the normal course of asking for keys to be returned when they are no longer needed. Any suggestion to the contrary is belied by the fact that almost immediately upon request, the key was returned to Malladi. And beyond that, Malladi was only without the scooter key for two days—over a weekend—and there was not even any allegation that the scooter was needed during the time Malladi did not have its key. This claim is meritless.

D. Retaliation Claims

Malladi makes allegations of retaliation in all six of the EEO charges being considered by the court in this order. Title VII provides protection against retaliation for those who oppose discrimination or participate in Title VII processes.[38] In evaluating claims of retaliation that are supported by circumstantial evidence, as Malladi's claim are, the court uses the burden-shifting framework set forth in *McDonnell Douglas*, and the cases that follow it, as an analytical guide. *Meeks v. Computer Assoc. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994); *See supra* § IiI.B.

The first stage of the framework requires that Malladi come forward and make out the prima-facie case of retaliation. To establish a prima-facie case of retaliation,

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[38] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this [title], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [title]." 42 U.S.C.A. § 2000e-3(a).

Malladi must show that: (1) she engaged in statutorily protected activity; (2) she suffered an adverse job action; and (3) there is a causal relationship between (1) and (2). *Meeks,* 15 F.3d at 1021. "To recover for retaliation, the plaintiff 'need not prove the underlying claim of the discrimination which led to [her] protest;' however, the plaintiff must have had a reasonable good faith belief that the discrimination existed." *Holifield,* 115 F.3d at 1566 (*quoting Tipton v. Canadian Imperial Bank of Commerce,* 872 F.2d 1491, 1494 (11th Cir. 1989)). Once Malladi has made out the prima-facie case, this creates a presumption that she suffered retaliation and shifts the burden to the VA Secretary.

In the second stage of the framework, the VA Secretary can defeat the presumption of retaliation by coming forward with a legitimate, non-retaliatory reason for the actions it took. The burden for the VA Secretary is one of production only, and not persuasion. Once the VA Secretary has presented this evidence, the presumption disappears, and the burden shifts back to Malladi to show that the VA Secretary's reason is a pretext for retaliation and that she was truly the victim of retaliation, which is the burden borne by Malladi at all stages.

In this case, there is no dispute that Malladi engaged in protected activity—that is, she filed EEO charges. To show that she suffered an "adverse job action," Malladi must demonstrate that the job action affected "a term or condition of employment and [the job action] is not adverse merely because the employee dislikes it or disagrees with it." *Perryman v. West,* 949 F. Supp. 815, 819 (M.D. Ala. 1996). The contours of what constitutes a "term or condition of employment" are not well developed in this circuit, but *Wu v. Thomas,* 996 F.2d 271 (11th Cir. 1993), indicated that it must be something like a loss of salary, benefits, or position. *Id.* at 273. Not all employment actions are actionable under Title VII. *Id.*; *see also Page v. Bolger,* 645 F.2d 227, 233

(4th Cir. 1981) ("[T]here are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscription . . . of Title VII."). Other circuits follow this general approach. *See, e.g., Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir. 1997) (" 'Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions.' 'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.' ") (*quoting Dollis v. Rubin,* 77 F.3d 777, 781-82 (5th Cir. 1995))); *Jeffries v. State of Kansas,* 946 F. Supp. 1556, 1567 (D. Kansas 1996) ("Although adverse job actions cover more than quantifiable losses of salary or benefits, 'not everything that makes an employee unhappy is an actionable adverse action.' *Smart v. Ball State Univ.,* 89 F.3d 437, 441 (7th Cir. 1996). To be actionable, the adverse employment action must be 'material:' '[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.' *Rabinovitz v. Pena,* 89 F.3d 482, 488 (7th Cir. 1996) (*quoting Crady v. Liberty Nat'l Bank & Trust,* 993 F.2d 132, 136 (7th Cir. 1993)).").

In analyzing an adverse employment action, it should be noted that "an adverse employment action does not, however, have to be an immediate economic injury. Some courts in addressing the issue of retaliation have identified a 'range of acts as adverse, based upon the scope of their consequences.' *Boyd* [*v. Brookstone Corp. of New Hamp-*

shire, 857 F. Supp. 1568, 1572 (S.D. Fla. 1994)]. A term or condition of employment may be said to have been affected if there is a 'demonstrable adverse impact on future employment opportunities or performances.' *Fortner* [*v. State of Kansas,* 934 F. Supp. 1252, 1266 (D. Kansas 1996)]." *Perryman,* 949 F. Supp. at 819.

For proof of the causal link, the plaintiff "merely has to prove that the protected activity and the negative employment action are not completely unrelated," *EEOC v. Reichhold Chemicals, Inc.,* 988 F.2d 1564, 1571-72 (11th Cir. 1993), but the employee "must at least establish that the employer was actually aware of the protected expression at the time the employer took adverse employment action against the plaintiff." *Holifield,* 115 F.3d at 1566 (*citing Goldsmith v. City of Atmore,* 996 F.2d 1155, 1163 (11th Cir. 1993)).

1. Failure to Allege an Adverse Job Action

In the six EEO charges being considered by the court in this order, Malladi has made twelve allegations of retaliation that fail to meet the very minimum requirements to make out a prima-facie case of retaliation. In order to make out the prima-facie case of retaliation, Malladi must allege that she suffered an adverse job action. "Adverse job action" is a term of art that has a legal meaning requiring that any contested job action must affect one of the "terms and conditions" of Malladi's employment in order to be adverse. The simple fact that Malladi considers the job action to be adverse does not raise it to the level of an adverse job action, and certainly does not support a charge of retaliation.

The allegations made by Malladi that do not amount to adverse job action, and thus fail to make out a prima-facie case of retaliation, are: (1) the second allegation in her eighth EEO charge, that Kahane's administrative assistant telephoned her at home while she was on sick leave to see if she could return to work; (2) her third

allegation in her eighth EEO charge, that she was denied her request to cancel the outpatient rehabilitation clinic and electromyography test; (3) her first allegation in her tenth EEO charge, that there was a breach of the settlement agreement; (4) her second allegation in her tenth EEO charge, that Kahane treated her improperly by allegedly shouting at her in front of her subordinates; (5) her allegation in her eleventh EEO charge, that the statements made by her subordinate employees to the EEO counselor in the course of the investigation of her ninth EEO charge were retaliatory; (6) her first allegation in her twelfth EEO charge, that Kahane treated her inappropriately relative to her management of subordinate employees in two incidents in her service involving patient abuse and financial dealing with a patient; (7) her second allegation in her twelfth EEO charge, that Clay made unreasonable delays in responding to Malladi's written request for an EEO counselor's report; (8) her third allegation in her twelfth EEO charge, that there was an inappropriate referral of her charges to the VA central office for procedural revew; (9) her second allegation in her thirteenth EEO charge, that the PM&RS staff was informed that she had been detailed to another service and removed as chief of PM&RS before she was notified; (10) her fifth allegation in her thirteenth EEO charge, that Kahane authorized her former subordinate to countersign Malladi's consultations; (11) her sixth allegation in her thirteenth EEO charge, that Clay inappropriately referred EEO charges for procedural review; and (12) her seventh allegation in her thirteenth EEO charge, that Kahane caused the keys to her chief of PM&RS office and to the government scooter to be taken from her the day she was detailed from PM&RS.

Malladi's allegation that she suffered an adverse job action because she was telephoned by the VA while she was at home on sick leave is patently meritless. There has been no credible showing that the phone call was anything other than that—a phone call to check Malladi's

availability to cover the absence of another physician. Even if it can be assumed that the VA knew she was unavailable when it called, there is no indication that the phone call was in any way used to influence the terms and conditions of Malladi's employment, and thus does not amount to an adverse job action. Consequently, this allegation of retaliation is without foundation.

The argument that Malladi suffered an adverse job action because of the denial of her request to cancel the outpatient rehabilitation clinic and electromyography test is also clearly without merit. In her EEO charge, Malladi claims that she suffered "unnecessary stress and harassment" because she was overworked that day, that she was distracted at the lecture and during her work, and that it was very hard to balance all these tasks, all of which led to "personal dissatisfaction which wasted my energies for some time." [39] Even if all of this were true, it has absolutely no impact on the terms and conditions of her employment, does not amount to an adverse job action, and is thus meritless.

Malladi alleges an adverse job action based on the alleged breach of the settlement agreement she entered into with the VA, because, she submits, "the Defendant created terms, conditions, and privileges of employment in this case when it entered into the settlement agreement with Dr. Malladi on March 30, 1995." [40] Malladi offers no authority for this proposition, and it is completely baseless. Her settlement agreement created a contract between her and the VA that is treated like any other contract, and that has no bearing on her salary, benefits, or position. It also created a completely separate means of resolving any claims of breach through the rules of contract law. These rules call for a separate action for

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[39] Defendant's exhibit Y, at 4.

[40] Plaintiff's opposition to defendant's motion for summary judgment, at 46.

enforcement of the agreement, or an action seeking a release of Malladi from her obligations under the contract, but they do not give rise to separate claims of retaliation for any alleged breaches of the agreement. This claim is therefore meritless.

The claim that Kahane's shouting at Malladi in front of her subordinates amounts to an adverse job action is without merit. Although not favored, some minimal amount of criticism or reprimand of employees, even with raised voices, is a routine occurrence in a work environment, and it does not amount to an adverse job action. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1298 (3d Cir. 1997) (rejecting the plaintiff's contention that "unjust reprimands" constituted discrimination because they did not "[r]ise to the level of conduct affecting [the plaintiff's] 'compensation, terms, conditions, or privileges' of employment," and observing that "not every insult, slight or unpleasantness gives rise to a valid Title VII claim"); *Jeffries*, 946 F. Supp. at 1568; *Nelson v. University of Maine System*, 923 F. Supp. 275, 282 (D. Me. 1996) ("[T]he Court views employee criticism, as with employee praise, as a normal incident of the working relationship between supervisors and those in their charge. Employee evaluation, important to both the employee and the employer, should not be hindered because of the important purposes it serves in improving both employee performance, and employer satisfaction."); *Simmerman v. Hardee's Food Systems, Inc.*, No. 94-6906, 1996 WL 131948, at *14 (E.D. Pa. Mar. 22, 1996) ("mere criticism and counseling alone do not constitute 'adverse action,' "); *Lefevre v. Design Prof'l Ins. Cos. and Thomas Conninger*, No. C-93-20720 RPA, 1994 WL 544430, *1 (N.D. Cal. Sept. 27, 1994) (harsh criticism of an employee's work does not constitute adverse employment action under Title VII). No matter how badly Malladi may have felt if Kahane did in fact shout at her, unless

the tension is shown to have affected the terms of conditions of her employment, it does not amount to an adverse job action. Because Malladi makes no such showing, this allegation is without foundation.

Retaliation must be perpetrated by Malladi's employer or its agent for it to fall within the proscription of Title VII or the Rehabilitation Act. 42 U.S.C.A. § 2000e(b). The statements of Malladi's subordinate employees to the EEO counselor do not fall within this proscription. *See, e.g., Garcia*, 28 F.3d at 451; *Hamilton*, 791 F.2d at 442-43. Even if it were possible for her subordinate employees' statements to be considered retaliation under Title VII or the Rehabilitation Act, there is no showing of how they affected the terms and conditions of her employment. Malladi claims that the statements were made by the employees, which provided a basis for Clay's procedural review of Malladi's other EEO charges and the request for a site visit, which in turn harmed Malladi's personal and professional image, and presumably allowed the administration to detail and reassign Malladi. Although Malladi is entitled to every reasonable inference based on the evidence she has presented, she is not entitled to every possible inference she can imagine, and, without further supporting evidence, this is far too fanciful an inference upon inference for the court to draw. There is no credible evidence that the statements by Malladi's subordinate employees amounted to an adverse job action, and thus the claim is meritless.

Malladi alleges that she suffered an adverse job action because of Kahane's inappropriate treatment of her in regard to her management of subordinate employees in two incidents involving patient abuse and financial dealing with a patient. This claim also without merit. Kahane says that Malladi did not act appropriately and that she did not follow his orders; Malladi says she did. Kahane wrote a memorandum allegedly blaming Malladi for what

he believed to be Malladi's inappropriate actions, and Malladi wrote a memorandum defending herself. No matter how these issues are resolved, and who was right and who was wrong, there is no showing that this exchange had any effect on the terms and conditions of Malladi's employment. There was clearly a dispute here, but there is nothing that amounts to an adverse job action.[41]

Maladi makes three separate claims that she suffered adverse job actions because of an unreasonable delay in responding to her written request for an EEO counselor's report and the inappropriate referral of her charges to the VA central office for procedural review. None of these claims amounts to an adverse job action because there has been no showing of how these actions affected the terms and conditions of Malladi's employment. *See, e.g., Boyd,* 857 F. Supp. at 1573 ("alleged actions in obtaining manufactured evidence, and submitting the evidence to the EEOC, do not implicate 'employment' in any form or manner"). Although these actions may conceivably have some bearing on the EEO processes to which they relate, this has no bearing on Malladi's salary, benefits, or position, and thus cannot support a charge of retaliation. All three of these claims are meritless.

The fact that Clay and Kahane informed the PM&RS staff that Malladi had been detailed to another service and removed as chief of the service before she was notified also does not amount to an adverse job action. In her EEO charge, Malladi claims that as a result of this action she was subjected to humiliation, harassment, discrimination, a loss of self esteem and morale, and mental torture.

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41 Admittedly, this set of circumstances led to an admonishment for Malladi. The admonishment, however, had not taken place before Malladi filed her twelfth EEO charge. The court must therefore conclude that Malladi is taking issue with the other events surrounding Kahane's treatment of her. The court is also led to this conclusion because the admonishment is covered by the eighth allegation in Malladi's thirteenth EEO charge.

The court cannot help but conclude that Malladi is being a bit overly dramatic in her statement of the effect this action had on her, but even if the court were to assume that she suffered some embarrassment and anguish as a result of this action, there has been no showing of how this action effected the terms and conditions of Malladi's employment. Although this action could safely be frowned upon by the court as an inappropriate way to proceed, it does not amount to an adverse job action, and is thus meritless.

Malladi alleges that she suffered an adverse job action when Kahane authorized her former subordinate to countersign her consultations. This action took place after Malladi had been detailed out of the PM&RS service and was no longer generally assigned to see patients within that service. Malladi's former subordinate then became the acting chief of PM&RS with all the responsibility for the treatment within the service. In her EEO charge, Malladi claims that this action defamed and humiliated her, and undermined her clinical privileges. Again, even if this were true, this action was taken as part of the normal actions taken as a reassignment within the hospital, and had no impact on Malladi's salary, benefits, or position. It is therefore without foundation.

Finally, Malladi alleges that she suffered an adverse job action when Kahane caused the keys to the chief of PM&RS office and to the government scooter to be taken from her the day she was detailed from PM&RS. These actions do not amount to an adverse job action either. The taking of her keys to the PM&RS service when she was no longer assigned there did not affect the terms and conditions of her employment. The assertion that the taking of her key to the government scooter amounts to an adverse job action is meritless. Malladi's keys were taken from her on January 19, 1996, which was a Friday, and upon her request on January 23, 1996, which was a Tues-

day, were returned to her. At most, Malladi was without the scooter for two workdays, and there is no indication that she needed the scooter at that time; in fact, the evidence suggests she only used it approximately once per month. In any event, Malladi makes no showing that the absence of the scooter had any impact on the terms and conditions of her employment, and it therefore does not amount to an adverse job action.

2. Hiring Requests

Malladi alleges that she was retaliated against for engaging in protected employment activity because (1), as alleged in her eighth EEO charge, her May 1995 request to hire a staff physiatrist was denied, and (2), as alleged in her ninth EEO charge, her August 1995 request to hire a staff physiatrist was denied. Malladi has alleged facts sufficient to make out the prima-facie case of retaliation based on these charges.

The VA Secretary does not contest that Malladi engaged in protected activity (the filing of EEO charges), and it cannot be sensibly contended that the VA did not have knowledge of Malladi's protected activity before it denied all of Malladi's hiring requests. As for the adverse job action suffered by Malladi, there is a long and complicated history of Malladi's requests for additional physician staffing, and from this history there is sufficient evidence to show that, if the court makes all reasonable inferences as it is required to do, Malladi suffered an adverse job action by having her requests for additional staffing continually denied.

Malladi alleges that she was the fourth physiatrist hired when she first joined PM&RS,[42] and that PM&RS has been short-handed since August 1992, when the third physiatrist position in PM&RS was vacated. She had been continually

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42 Plaintiff's exhibit B, at 390.

recruiting, but had had no quaified applicants until February 1994. Malladi made three requests to hire a staff physiatrist that were denied prior to the ones covered in her eighth and ninth EEO charges—two were in February 1994 [43] and one was in December 1994. In November 1994, Malladi also requested that she be allowed to hire a physical therapist and an occupational therapist, and these requests were denied.[44]

On May 12, 1995, Malladi made another request to be allowed to recuit and hire a staff physiatrist.[45] After a meeting with Clay and Kahane, Kahane sent Malladi a memorandum denying her request and explained that such disapproval came only "after many, many reviews" and that it was being denied because of the hospital's limited resources.[46] In August 1995, Malladi alleges she made a verbal request to the associate director of the medical center to hire a staff physiatrist.[47] At the August 23, 1995, meeting of the Resources Committee, while her request was denied for inadequate funds, staffing position allotment, and lack of demonstrated need, the committee received an oral request to fill two positions in Medical Services.[48] The decision on these two positions was deferred.[49] Malladi alleges that these two positions were ultimately filled, and that the requesting service chief was not required to provide workload statistics like she was made to provide with her requests.[50]

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[43] Defendant's exhibit C, ¶ 12, and defendant's exhibit D, ¶ 3 and attachment 2.

[44] Defendant's exhibit C, ¶ 15, and attachment 14.

[45] Defendant's exhibit Y.

[46] Defendant's exhibit C, ¶ 19, and attachment 19.

[47] Defendant's exhibit Z.

[48] Defendant's exhibit C, ¶ 21, and attachment 20.

[49] Defendant's exhibit C, ¶ 21, and attachment 20.

[50] Defendant's exhibit Z; Plaintiff's exhibit B, at 489-92.

The repeated requests for more staffing, along with the ongoing dispute Malladi was having with the management over her workload and the staff required to meet the workload, formed one of the bases on which the TVAMC management sought a site visit of Malladi's service.[51] Together, the request for the site visit and the site visit itself, began the steps that led to Malladi's detail, to the negative site visit team report, and to her reduction in pay, all of which have no doubt had a serious impact on the terms and conditions of her employment. This evidence submitted by Malladi is sufficient to make out a prima-facie case of retaliation.

In response to Malladi's claims of retaliation, the VA Secretary has come forward with legitimate, non-discriminatory reasons for its denial of Malladi's hiring requests. In many, varied documents, the VA asserts that Malladi's workload did not justify additional physician staff, the VA did not have sufficient funds to hire additional physician staff, and Malladi's service lacked approved physician staffing positions into which she could hire a new person. This proffer of this evidence is more than sufficient to meet the VA Secretary's burden and defeat the presumption that the VA retaliated against Malladi.

The VA Secretary having come forward with legitimate, non-discriminatory reasons for its actions, the burden shifts back to Malladi to show that there are material issues of fact relating to whether the VA's reasons are pretext for retaliation, and thus that she was truly retaliated against. Malladi has not carried her burden in this phase. To attempt to carry this burden, Malladi relies on a number of facts that do not even suggest that retaliation was motivating the VA's actions. She points to the VA's continued insistence that she did not need more staff, and its continued insistence that her workload statistics were erroneous. The court does not see now these raise any question

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[51] Defendant's exhibit D, ¶ 8.

at all that the VA was motivated by a retaliatory motive in denying her hiring requests. They certainly point to a disagreement, which Malladi may feel is retaliatory, but her bare assertions of the retaliatory connection are not enough to survive summary judgment.

Malladi also relies very heavily on the site visit team's report, and the one finding in particular that the site visit team identified a sense of concern from the management and from other people at TVAMC concerning Malladi's history of EEO charges. This finding brings the issue of Malladi's EEO charges to the fore, but, in light of the evidence presented, the court cannot conclude that it points to a retaliatory motive. Malladi had a long and distinguished history of filing EEO charges, and it would have been curious if, in investigating her service, this issue had not come up. It would have been impossible to avoid it. When one person files approximately ten EEO charges in the preceding three-year period, the filing of charges would reasonably become itself a dominant theme in the workplace. The VA Secretary insists, and presents considerable evidence from the site visit team members and the employees of TVAMC to the same effect, that the written finding was not intended to indicate that management was driven by the EEO charges in any of its decisions, but simply that the charges were a significant theme in its interaction with Malladi. The site visit team wrote: "As a result of the continued filing [of EEO complaints], the members of the triad feel incapacitated in providing the Chief with adequate direction and assistance in management of her service." The court completely understands this conclusion because Malladi appears to have filed an EEO charge on every conceivable ground she could imagine, no matter how frivolous. And beyond this one finding, and the other bases that Malladi has identified that do not point to a retaliatory motive, she has not presented any other evidence that calls into question the VA's non-

retaliatory reasons or makes the court think that these reasons were false or pretext for retaliation.

Indeed, an employee, such as Malladi, must not be allowed to bootstrap her own abuse of the work environment into a retaliation claim. In other words, an employee should not be allowed to flood an employer with EEO charges, many of which are frivolous, and then claim that, because the filings have adversely affected her work environment, she is a victim of retaliation. *Cf. Rollins v. State of Florida Dept. of Law Enforcement,* 868 F.2d 397, 401 (11th Cir. 1989) ("The record reveals, and the trial court found, that FDLE denied Rollins' applications for promotions because she had earned the reputation as a disruptive complainer who antagonized her supervisors and colleagues and impaired the morale of her unit. Such conduct, even when associated with complaints of discrimination, has been held to fall outside the protection of [Title VII] and to provide the employer with a legitimate basis for its action."). In that instance, the employees, not the employer, is responsible for adverse work environment, and here the record overwhelmingly reflects that such was the case with Malladi.

The court is mindful of Eleventh Circuit precedent that sets the relatively low standard for Malladi to survive summary judgment, *see Hairston v. Gainesville Sun Pub. Co.,* 9 F.3d 913, 921 (11th Cir. 1993) ("The burden to avoid summary judgment is not to show by a preponderance of the evidence that the reasons stated were pretext. Rather, plaintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext, and that the action taken was in retaliation for engaging in the protected activity. Issues of fact and sufficiency of evidence are properly reserved for the jury. The only issue to be considered by the judge at summary

judgment is whether the plaintiff's evidence has placed material facts at issue."), and the precedent that directs that questions of motive or intent are best resolved by the jury, *see Pearson v. Macon-Bibb County Hosp. Auth.*, 952 F.2d 1274, 1280 (11th Cir. 1992) (" '[S]ummary judgment is not a proper vehicle for resolving claims of employment discrimination which . . . turn on an employer's motvation and intent.' ") (*quoting Delgado v. Lockheed-Georgia Co.*, 815 F.2d 641, 644 (11th Cir. 1987))). Nonetheless, Malladi has not presented evidence sufficient to put issues of pretext in question. The evidence presented leads the court to only one reasonable conclusion: that Malladi has presented frivolous claim upon frivolous claim, and is now trying to use these claims to hold the VA hostage under a retaliation theory for being concerned about this long history of charges. This court will not sanction this because it simply sees no evidence that retaliation was motivating the VA. The court only sees an employer that was in an exceptionally difficult situation, and the difficulty will not be compounded here.

3. Site Visit, Detail, Reassignment, and Admonishment

Malladi alleges that she was retaliated against for engaging in protected employment activity based on several incidents surrounding her eventual reassignment from her position as chief of PM&RS. Her specific allegations of retaliaton include the following: (1) there was an unfair and inappropriate request for a site visit team visit, as alleged in her twelfth EEO charge; (2) she was detailed from PM&RS to Ambulatory Care, as alleged in her thirteenth EEO charge; (3) the site visit team's report was biased and unfair and targeted Malladi as chief of PM&RS and as a physiatrist, as alleged in her thirteenth EEO charge; (4) her detail had a corresponding reduction in pay of $8,250 annually, which represented the loss of pay for being a service chief and not a reduction in her base

pay, as alleged in her thirteenth EEO charge; and (5) Kahane gave her a proposed memorandum of admonishment and the subsequent memorandum of admonishment, as alleged in her thirteenth EEO charge. The VA Secretary concedes that allegations (2) through (5) constitute adverse job actions, and because the VA Secretary already conceded that Malladi was engaged in protected activity, and the Secretary was well aware of Malladi's history of filing EEO charges prior to the occurrence of these events, Malladi has made out the prima-facie case of retaliation. The court also find that Malladi meets the prima-facie case for allegation (1) because the court believes it to be part and parcel of other four.

To meet his burden in the second stage of the *McDonnell Douglas* burden-shiftinng analysis, the VA Secretary has come forward with legitimate, non-retaliatory reasons for his actions. The VA Secretary has presented evidence of the long and twisted history of complaints and dissatisfaction with Malladi's management of her service and her interaction with the management of TVAMC. To explain its decision to detail and ultimately reassign Malladi, the management relied specifically on the site visit team's report. This report detailed problems with Malladi's management, including a lack of planning and effective control of the service, problems with her relationship with her staff, including low morale, infighting, fear of her retaliation, a lack of communication, and problems with her relationship with TVAMC management. To explain and justify the admonishment of Malladi for her management of her employees, the VA Secretary points to the severity of the offense, the continued working of the offending employee in patient care during Malladi's delay in informing the chief of staff of the offense, and Malladi's length of service, all as factors that should have prompted different action by Malladi but did not. This evidence presents more than enough of a legitimate, non-discriminatory explanation for the VA's actions

against Malladi, and thus defeats the presumption that the VA retaliated against Malladi.

Since the VA has come forward with legitimate, non-discriminatory reasons for its action, the burden then shifts back to Malladi to demonstrate that the reasons are pretext for retaliation and that she truly suffered retaliation. To carry her burden here, Malladi relies on the same evidence she relied upon in attempting to carry her burden for the denial of her hiring requests. She points to the continual denial of her hiring requests, and the continued disagreement about her workload statistics. Again, the court does not see how these in any way indicate that the VA was driven by a retaliatory motive. Malladi also points to the site visit team's finding in its report that Malladi's EEO charges were a predominant theme at the VA during the time of the site visit team's review. This unquestionably points to the fact that the EEO charges were a significant occurrence at the VA, but, as already stated in the preceding section, the court cannot imagine how it could be otherwise. With Malladi's history of filing EEO charges, the charges must have been significant to the management and must have had a substantial impact on the management's interaction with Malladi. This piece of evidence alone, particularly in light of the evidence presented by the VA Secretary that the finding was not meant to suggest that the management was motivated to take action by the EEO charges, is not sufficient to raise a question about the management's motives. And Malladi has presented no other evidence that the VA's reasons were not justified and legitimate, and served as pretext for discrimination. She simply points to the fact that they were continually under the shadow of the EEO charges and that it was known around the hospital. With this one piece of evidence, the court is only led to one conclusion by the evidence presented—that, as stated, Malladi has presented frivolous claim upon frivolous claim, and is now trying to use these claims to hold the VA hostage under a

retaliation theory for being concerned about this long history of charges. This piece of evidence will not suffice to survive summary judgment.

E. Review of Grievances under the APA

The final agency decisions with respect to Malladi's grievances are subject to judicial review under the APA. In this case, Malladi challenges three of her formal grievances on various grounds. First, Malladi challenges her grievance with respect to her proficiency rating on the ground that the VA did not comply with the procedures it has adopted to govern its action; second, she challenges her grievance with respect to her letter of admonishment on the ground that the evidence did not support the conclusion reached by the grievance examiner; and, finally, she challenges her grievance with respect to her permanent reassignment on the ground that the VA's characterization of her grievance as non-disciplinary deprived her of rights she should have been afforded under the procedures governing disciplinary actions.

At the summary judgment stage, the court does not look at whether there is a genuine issue of material fact, but instead turns directly to the question of the validity of the challenge. *See, e.g., Good Samaritan Hosp., Corvallis v. Mathews,* 609 F.2d 949, 951 (9th Cir. 1979). In evaluating these challenges, the court uses the statutory standards designated in 5 U.S.C.A. § 706(2).[52] The

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[52] Section 706 provides:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—

court may set aside an agency action, finding, or conclusion under the standard in § 706(2)(A), where the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *The Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). This standard is exceedingly deferential to the agency's decision. *Id.*[53] An agency decision can also be set aside under the standard set forth in § 706(2)(D), which targets decisions that are "without observance of procedure required by law." The procedure required by law is determined by the statutes and regulations under which the agency's action was taken. The agency is bound by the terms of the regulations it enacts according to Congressional authority, because validly enacted regu-

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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statuory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

53 "To determine whether an agency decision was arbitrary and capricious, the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . '[a]dministrative decisions should be set aside in this context . . . only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.' . . . The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action." *The Fund for Animals*, 85 F.3d at 541-42 (citations omitted).

lations have the force of law. *Chrysler Corp. v. Brown,* 441 U.S. 281, 295, 99 S. Ct. 1705, 1714 (1979). The binding of the agency to its regulations does not apply to every policy the agency adopts, but to only to regulations adopted according to Congressional authority. In all of her challenges, Malladi bears the burden of establishing the validity of her challenge.

1. Proficiency Rating

Malladi seeks review of the VA's decision to deny consideration of her grievance with respect to her proficiency rating. She claims that she is not taking issue with the actual rating she received, but with the VA's contravention of its procedure that requires counseling of an employee before a less-than-satisfactory-rating is given.[54] The VA's basis for denying consideration of the grievance is the section of its procedures that identifies matters excluded from converage under the grievance procedure, specifically, "Complaints arising from dissatisfaction with profiency rating." [55] The VA's letter informing Malladi of the denial of consideration of this grievance concluded that because the anticipated remedy for a challenge to the contravention of the procedure would have the effect of voiding the proficency rating, it was within the scope of the types of grievances excluded.[56]

Considering the literal language of the exclusion identified by the VA Secretary, the court believes this grievance falls within the exclusion. Malladi's grievance arises generally out of her dissatisfaction with her profficiency rating —that she was not given notice ahead of time, with an opportunity to respond, and conceivably mend her ways.

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[54] Defendant's exhibit HH, grievance of proficiency rating booklet, at tab E.

[55] Defendant's exhibit GG at 8B-7.

[56] Defendant's exhibit HH, grievance of proficiency rating booklet, at tab 1.

The court is not convinced that the procedure Malladi alleges that the VA failed to follow was obligatory on the VA in this situation.

There is no question that the regulations of the VA have the force of law and must be followed by the agency. The small excerpt that Malladi included in her submission to the grievance examiner appears to be part of the official regulations promulgated by the department.[57] The specific language of § (e)(1) on the page submitted states, in relevant part, "At any time during the appraisal period when performance problems are observed which may be expected to result in a low[/minimally] satisfactory or unsatisfactory annual proficiency rating, the rating officials will hold a counseling conference with the employee sufficiently in advance of the due date of the annual report to inform the employee of the deficiencies, give the employee a reasonable opportunity to correct identified deficiencies and demonstrate satisfactory performance, as follows : (a) For a permanent employee . . . for whom a low[/minimally] satisfactory or unsatisfactory annual or special proficiency rating is to serve as a basis for action under MP-5, Part II, Chapter 8 and its [VHA] Supplement, the documented counseling requirements . . . must be met. . . . (b) For all other employees, the documented counseling requirements . . . are recommended." [58]

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[57] The court reaches the conclusion that these are the official regulations promulgated by the VA, as published in the Federal Register, by inference. In a Westlaw search looking for MP-5, Part II, Chapter 8, which is the portion of the VA's regulations addressing disciplinary actions and grievance procedures, and which was provided to the court in defendant's exhibit GG, the court located it in 57 Federal Register 3815 (1992), 1992 WL 14293. The excerpt furnished by the plaintiff appears to be from Chapter 6 of the same set of regulations, although it could not be located in the on-line Federal Register.

[58] Defendant's exhibit HH, grievance of proficiency rating booklet, at tab E.

Counseling of employees for low or unsatisfactory ratings is clearly not a universal requirement under the VA regulations, and is mandatory in only a very limited set of circumstances. It is only required where the proficiency rating is to serve as the basis for action under the section that covers disciplinary actions and grievance procedures. The court interprets the phrase "basis for action" to refer to a disciplinary action or major adverse action, which are covered by part A of chapter 8 of the regulations. As discussed below, *see infra* § III.E.3, the categories "disciplinary action" and "major adverse action" include: admonishment, reprimand, suspension, transfer, reduction in grade, reduction in basic pay and discharge.[59] The lowered proficiency rating that Malladi received has not formed the basis for any such action; in fact, to the best of the court's knowledge, it has not been used for any purpose at all. Because the rating has not formed the basis of an action under the section designated, the lowering of the proficiency rating here does not fall within the law governing the VA's action, and is not relevant to the VA's grievance.

Along with the excerpt from the official regulations, Malladi also includes a policy memorandum, number 05-93-32, which appears to have been circulated around TVAMC. This memorandum directs that counseling of employees is required whenever a proficiency rating is given, but this memorandum does not indicate that it was issued according to the VA's authority as conferred by Congress. As such, this memorandum does not have the force of law in the proficiency rating process like the other regulations promulgated by the VA, and it therefore cannot serve as the basis of a policy the VA must follow in giving Malladi a proficiency rating. Malladi's challenge to this grievance is therefore without merit.

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[59] Defendant's exhibit GG, at 8-2 to 8-3.

2. Letter of Admonishment

Malladi seeks review of the grievance examiner's report with respect to her letter of admonishment for her handling of patient/employee matters because, as Malladi alleges, she was inappropriately admonished. In summarizing her challenge to the grievance she states, "[t]here is ample evidence in the record to demonstrate that Dr. Malladi was treated arbitrarily in her admonishment for not reporting an incident, when it is clear that she followed existing policy, was not found culpable by the investigating boards, and when a person holding a position superior to her was not disciplined for the same reasons." [60] What Malladi neglects to recognize is that this is her interpretation of the evidence in the administrative record, and that there is also ample evidence in the record to support the conclusion that Malladi acted inappropriately and in contradiction to VA policy, that her actions potentially endangered patient well-being by not expeditiously removing a potentially dangerous staff member from patient care, and that a letter of admonishment was more than appropriate.

After examining the evidence in the record, the court finds that Malladi's challenge represents nothing other than a difference of opinion with the conclusion of the grievance examiner. It certainly does not lead to the court to conclude that the grievance examiner's decision was arbitrary and capricious, or without basis in the record. Since Malladi comes forward with no other indication of how the grievance examiner's report is infirm, which is her burden to bear, the court concludes that the report with respect to this grievance was appropriate and supported and is entitled to deference by this court. The challenge to this grievance is also without merit.

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[60] Plaintiff's reply brief in opposition to defendant's motion for summary judgment, filed August 18, 1997, at 17.

3. Permanent Reassignment

Malladi seeks review of the grievance report with respect to her permanent reassignment because, she alleges, the reassignment was disciplinary in nature, in contradiction to what the VA asserts, and that she was therefore deprived of the procedures afforded grievants when disciplinary actions are involved. This is the only basis on which she alleges the examiner's report is infirm.

To resolve this issue, the court looks to the VA's policies regarding employee grievances.[61] The policies define very clearly the types of actions that are covered by the procedures for disciplinary and major adverse actions. "Disciplinary actions" are defined as "adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance."[62] Both "admonishment" and "reprimand" involve the issuance of an "official letter of censure" for different levels of offense.[63] "Major adverse actions" are defined as "suspension (including indefinite suspension), transfer, reduction in grade, reduction in basic pay, and discharge based on conduct or performance."[64] "Transfer" is further defined as "[t]he involuntary movement of an employee from one VA facility to another (under separate managerial authority)."[65]

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61 Defendant's exhibit GG.

62 *Id.* at 8-2. Although it is not clear whether the definition of "disciplinary actions" is meant to include only admonishment and reprimand, or is meant to include at least admonishment and reprimand, the discussion of specific procedures pertaining to "disciplinary actions" later in the policies suggests that it is meant to include only admonishment and reprimand. *See id.* at 8-10 to 8-14.

63 *Id.*

64 *Id.* at 8-3.

65 *Id.*

From the VA's own policies, it does not appear that the action that Malladi challenges falls within the coverage of the procedures for disciplinary actions. Although it may be true that some of the reasons stated by the VA to support its decision to reassign Malladi may also form the basis for a disciplinary action, they have not led to such a disciplinary action here. Reassignment of employees is a power within the VA's prerogative. And so long as they have not taken any of the other actions that have the effect of being disciplinary, Malladi is not entitled to the procedures for disciplinary actions.

As for the reassignment, there is more than adequate evidence in the record to support the VA's decision to reassign Malladi. Although she may disagree with this decision, she certainly cannot argue that it was not a reasonable conclusion based on the evidence. This challenge is without merit.

IV. CONCLUSION

For the foregoing reasons, the VA Secretary's motion for summary judgment will be granted in full. An appropriate judgment will be entered.

DONE, this the 1st day of December, 1997.

/s/ Myron H. Thompson
MYRON H. THOMPSON
United States District Judge

[Filed Dec. 1, 1997]

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

Civil Action No. 96-T-431-E

VISALAKSHI MALLADI,
Plaintiff,

v.

JESSE BROWN, in his official capacity as
Secretary of Veterans Affairs,
Defendant.

JUDGMENT

In accordance with the memorandum opinion entered on this date, it is the ORDER, JUDGMENT, AND DECREE of the court:

(1) The motion for summary judgment filed by defendant Jesse Brown on June 18, 1997, is granted in full.

(2) Plaintiff Visalakhi Malladi's seven EEO charges are dismissed without prejudice.

(3) With regard to the remainder of this case, judgment is entered in favor of defendant Jesse Brown and against plaintiff Malladi, with plaintiff Malladi taking nothing by her complaint.

It is further ORDERED that costs are taxed against plaintiff Malladi, for which execution may issue.

DONE this the 1st day of December, 1997.

/s/ Myron H. Thompson
MYRON H. THOMPSON
United States District Judge

APPENDIX C

[Filed Oct. 2, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-7027

VISALAKSHI MALLADI,
Plaintiff-Appellant,

versus

HERSHEL GOBER, in his official capacity as
SECRETARY OF VETERANS AFFAIRS,
Defendant-Appellee.

On appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
JOEL F. DUBINA
United States Circuit Judge

Supreme Court, U.S.
FILED
APR 1 1999
CLERK

No. 98-1054

In the Supreme Court of the United States

OCTOBER TERM, 1998

VISALAKSHI MALLADI, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the district court properly granted summary judgment for respondent in petitioner's lawsuit charging respondent with unlawful employment-related discrimination and retaliation for protected activity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bowden v. *United States*, 106 F.3d 433 (D.C. Cir. 1997)	7
Ferguson v. *Flying Tiger Line, Inc.*, 688 F.2d 1320 (9th Cir. 1982)	7
Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)	7
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	8
Merritt v. *Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997)	8
Morgan v. *South Bend Community Sch. Corp.*, 797 F.2d 471 (7th Cir. 1986)	7
Raley v. *Ohio*, 360 U.S. 423 (1959)	5, 6
Rose v. *Davis*, 474 So. 2d 1058 (Ala. 1985)	7
Sheng v. *Starkey Labs., Inc.*, 117 F.3d 1081 (8th Cir. 1997)	7
Smart v. *Ball State Univ.*, 89 F.3d 437 (7th Cir. 1996)	8-9
Snider v. *Circle K Corp.*, 923 F.2d 1404 (10th Cir. 1991)	7
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985)	8

Constitution and statute:

U.S. Const. Amend. XIV (Due Process Clause)	6
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	7

Miscellaneous:

	Page
Restatement of Contracts (1932)	7
Restatement (Second) of Contracts (1979)	7, 8
Restatement (Second) of Contracts (1981)	7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 2a-59a) is reported at 987 F. Supp. 893.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998. A petition for rehearing was denied on October 2, 1998 (Pet. App. 61a). The petition for a writ of certiorari was filed on December 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a physician who has worked for the Department of Veterans Affairs (VA) since 1985. Pet. 3. In 1988, petitioner began serving as a staff physiatrist—a physician who specializes in the treatment of illness by physical means—in the Physical Medicine and Rehabilitation Service (PM&RS) of the VA Medical Center in Tuskegee, Alabama. Pet. App. 6a. The VA designated petitioner Acting Chief of the PM&RS in September 1988, and subsequently appointed her Chief of the PM&RS in March 1989. *Ibid.*

2. Between 1992 and January 1995, petitioner filed seven Equal Employment Opportunity (EEO) administrative complaints against the VA. Pet. App. 6a. In these complaints, petitioner alleged that the VA had discriminated against her on the basis of her race, sex, national origin, and handicap, and had retaliated against her for engaging in protected activity. *Ibid.*

In 1995, petitioner signed a "global settlement agreement" in which she agreed to withdraw the seven EEO complaints and waived her right to file a civil action in connection with the discriminatory and retaliatory acts they alleged. Pet. 8; Pet. App. 6a. For its part, the VA agreed (among other things) to "provide [petitioner] with an opportunity for management training." *Id.* at 13a n.6. The VA also agreed that, should it "fail to comply with any of the terms" of the agreement, it would reopen petitioner's complaint for further processing. Pet. 7; Pet. App. 13a. During the six months following the settlement, the VA notified petitioner (along with other employees) of two opportunities for management training. See *id.* at 16a. Petitioner did not respond to these notifications. See *ibid.*

3. In the remainder of 1995 and 1996, petitioner filed six more EEO complaints and four administrative grievances against the VA. Pet. App. 6a-11a. Several of these EEO complaints focused on her superiors' unwillingness to grant petitioner's requests to fill staff positions in the PM&RS. See *id.* at 6a, 7a. Petitioner's discrimination and retaliation charges included allegations that employees of the VA had called her at home once when she was on sick leave, shouted at her during a meeting, made negative statements about her to an EEO counselor investigating her earlier EEO complaints, and taken too long to respond to her request for an EEO counselor's report. See *id.* at 6a-11a.

During this period, the Director of the Tuskegee Medical Center asked the VA Central Office to conduct an external review of the PM&RS, to address morale problems among the staff. Pet. 4; Pet. App. 7a. The VA granted the request and assigned a committee of doctors culled from other VA offices to conduct the external review. Pet. 4. Before visiting the Medical Center, the committee asked the Director of the Medical Center to send them all of the formal complaints and grievances filed by staff or patients of the Medical Center over the prior several years. Pet. 4-5.

The committee conducted the external review in late 1995, and issued a report summarizing its findings. Pet. App. 7a-9a. In the report, the committee noted that it found serious problems in the PM&RS, including very low employee morale, infighting among employees, minimal evidence of quality improvement initiatives, and irreconcilable differences between petitioner and her staff. *Id.* at 7a-8a. The committee also observed that petitioner's "continued filing" of EEO complaints had caused her superiors to "feel incapacitated in providing [her] with adequate direction and assistance in

management of her service." *Id.* at 8a; see *id.* at 47a. After the report issued, the VA reassigned petitioner to another position within the Medical Center. *Id.* at 9a. Petitioner's twelfth and thirteenth EEO complaints included allegations that the VA's actions in connection with the external review and her subsequent reassignment constituted discrimination against her on the basis of her race, sex, national origin, and handicap, as well as retaliation for her earlier filing of EEO complaints. *Id.* at 9a-11a.

4. In March 1996, petitioner filed this action in the United States District Court for the Middle District of Florida. Pet. App. 10a. The VA moved for summary judgment on all counts, and on December 1, 1997, the district court granted the motion. *Id.* at 59a. In a 72-page memorandum opinion accompanying its judgment, the district court carefully examined each of petitioner's allegations and explained why none could survive the VA's motion for summary judgment.

a. The district court first rejected petitioner's claim pertaining to the seven EEO charges underlying the global settlement agreement. The court acknowledged petitioner's allegation that the VA had breached the portion of the agreement requiring the VA to provide petitioner with management training by failing to make a "special effort" to give her "special notice" of training opportunities. Pet. App. 16a. Observing that settlement agreements are treated as contracts, and conceding that the VA "may well" have breached this term of the agreement,[1] the court nevertheless rejected petitioner's claim on the ground that any breach of this

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[1] The court also stated that it agreed with the Equal Employment Opportunity Commission's finding that this portion of the agreement had been breached. Pet. App. 17a.

term by the VA could not be considered a "material" breach that would entitle petitioner to the relief she sought. *Id.* at 16a-17a.

b. The court also rejected petitioner's attempt to use the external review committee's report and recommendations as evidence that the VA had retaliated against her for having filed EEO complaints. Based on "considerable evidence" submitted by the VA, the court concluded that the reference to petitioner's EEO complaints in the committee's report "was not intended to indicate that management was driven by the EEO charges in any of its decisions, but simply that the charges were a significant theme in its interaction with [petitioner]." Pet. App. 47a. The court noted that the presence of this "significant theme" was hardly surprising, in light of the fact that petitioner "appear[ed] to have filed an EEO charge on every conceivable ground she could imagine, no matter how frivolous." *Ibid.*

5. The court of appeals affirmed the district court's judgment in an unpublished one-sentence per curiam order "based on the thorough and well-reasoned memorandum opinion of the district court." Pet. App. 1a.

ARGUMENT

The decision of the courts below was correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review of this case is unwarranted.

1. a. Petitioner first argues (Pet. 6-8) that the courts below failed to enforce the agreement settling prior EEO complaints, and thereby violated the principle of *Raley* v. *Ohio*, 360 U.S. 423 (1959). This argument has no merit. In *Raley*, this Court held that the criminal conviction of several individuals for their failure to answer questions put to them by a state "Un-American

Activities Commission" violated the Due Process Clause of the Fourteenth Amendment because the Commission's Chairman had assured the individuals, when they were questioned, that they had a right under the State's constitution to refuse to answer questions that might incriminate them. *Id.* at 437-442. *Raley* has no relevance to this case. Petitioner has not been subjected to a criminal prosecution, and has not sought to invoke her rights under the Fourteenth Amendment.

As for petitioner's allegation that the courts below erred in their application of certain terms of the global settlement agreement, this fact-bound claim has no significance beyond petitioner's particular case, and thus clearly does not merit review by this Court.

b. Furthermore, the decisions below on this matter were correct. Petitioner's argument is based on the allegation that the VA breached the term of the agreement providing that the VA shall, "[i]n good faith, provide [petitioner] with an opportunity for management training." Pet. App. 13a n.6. But the VA fulfilled this obligation by providing petitioner with two opportunities for management training, notifying her of courses in which she could seek to enroll. *Id.* at 16a. Petitioner made no effort to take advantage of either of these opportunities. *Ibid.* It is not clear (and petitioner does not explain) what more this provision could have required of the VA. And even assuming that this clause obliged the VA to make "special" (see *ibid.*) efforts to assist petitioner in obtaining management training, there is no basis for the conclusion that the VA would not have made such efforts had petitioner shown any interest in the training opportunities extended to her.

In addition, the district court correctly found that any shortfall in the VA's performance of this term could

not be considered a "material" breach of the agreement that would entitle petitioner to the relief she sought. As the district court pointed out, a settlement agreement is a contract, and issues of its enforcement thus must be resolved by reference to the law of contracts.[2] Pet. App. 13a-14a; see also *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). The court properly observed that, pursuant to well-established principles of contract law, a party's failure to perform a contract duty may not excuse the other party from her corresponding duties unless the failure to perform is "material." Pet. App. 14a (citing Restatement of Contracts §§ 274, 397 (1932) and Restatement (Second) of Contracts § 241 (1979)); see also Restatement (Second) of Contracts § 237 (1981); *Rose* v. *Davis*, 474 So. 2d 1058, 1061 (Ala. 1985).

Among the factors considered in determining whether a breach is material are the extent to which the other party can be adequately compensated for the failure of performance, the likelihood that the breaching

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[2] The courts of appeals have divided over the issue whether the interpretation of settlement agreements disposing of claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, should be governed by the law of the forum State, or instead by federal common law. Compare, for example, *Snider* v. *Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991) (applying federal common law), with *Morgan* v. *South Bend Community Sch. Corp.*, 797 F.2d 471, 474-479 (7th Cir. 1986) (applying state law). The issue is of no consequence in this case, however, because, as we demonstrate *infra*, the result would be the same under either approach. Cf. *Sheng* v. *Starkey Labs., Inc.*, 117 F.3d 1081, 1083 n.1 (8th Cir. 1997) (declining to reach issue of applicable law when determination would not affect the result); *Bowden* v. *United States*, 106 F.3d 433, 439 (D.C. Cir. 1997) (same); *Ferguson* v. *Flying Tiger Line, Inc.*, 688 F.2d 1320, 1322 n.2 (9th Cir. 1982) (same).

party will cure the failure of performance, and the extent to which the breaching party's behavior comports with standards of good faith and fair dealing. See Pet. App. 14a-15a (citing Restatement (Second) of Contracts § 241 (1979)). In this instance, there was no reason to doubt that petitioner could be made whole for the alleged shortfall in the VA's performance, either by an action for damages or by more strenuous efforts on the VA's part to enroll petitioner in management training. Nor was there any basis upon which to question the VA's good faith, in light of the fact that it provided petitioner with two management training opportunities which she declined to pursue.

Contrary to petitioner's assertion (Pet. 7), a contract term providing that one party will be released from its contractual obligations should the other party fail to "comply with any of the terms" of the contract cannot reasonably be read to trigger release whenever a party's performance suffers from any conceivable shortcoming, however inconsequential. Such a clause cannot override the parties' reasonable expectation that only a material shortfall in performance will be treated as a failure to comply with a contract term.

2. Petitioner also argues (Pet. 10) that the courts below erred in applying the burden-shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because she presented the district court with direct evidence of retaliation by the VA. See, *e.g.*, *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Merritt* v. *Dillard Paper Co.*, 120 F.3d 1181, 1191 (11th Cir. 1997) (same for allegation of retaliation); *Smart* v. *Ball State Univ.*, 89

F.3d 437, 439 (7th Cir. 1996) (same). This argument is likewise meritless.

What petitioner characterizes as "direct evidence" that her reassignment was motivated by retaliatory animus consists of a few references to her EEO filings that appear in the report of the external review committee that evaluated the Tuskegee Medical Center's PM&RS. Pet. 10-12. These references offer no direct support for the proposition that petitioner's reassignment was motivated by retaliatory animus. They are merely passing mentions included in a much broader report that detailed numerous problems with petitioner's management, including "very low employee morale, substantial infighting among employees, minimal evidence of quality improvement initiatives, poor use of the coordinator position, no communication within the service or with the administration, irreconcilable differences between [petitioner] and the staff, no evidence of workload validation, no process for downsizing, no prioritization of patients to be seen, and no strategic plan." Pet. App. 7a-8a. Evidence indicating that the report as a whole influenced the reassignment action (Pet. 11-12), then, in no way constitutes direct evidence that the few references to petitioner's EEO complaints contained in the report themselves influenced this action. Indeed, as the district court noted, given petitioner's "long and distinguished history of filing EEO charges, * * * [i]t would have been impossible [for the committee] to avoid" mentioning those charges in its review of the workplace environment at the PM&RS. Pet. App. 47a. Connecting these references to the reassignment action thus would require pure speculation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in his official capacity as Secretary,
Department of Veterans Affairs,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial judge's refusal to reopen seven (7) EEO complaints underlying a global settlement agreement violated this Court's position in *Raley v. Ohio*, 360 U.S. 423 (1959)?

2. Whether the trial judge incorrectly applied the *McDonnell Douglas* "circumstantial evidence" analysis to the Plaintiff's Title VII retaliation claim instead of the "direct evidence" analysis?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970)	3
Heckler v. Community Health Services, 467 U.S. 51 (1984)	2, 3
Humphrey v. Erie R. Co., 116 F. Supp. 660 (DC NY 1953)	3
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	4
Raley v. Ohio, 360 U.S. 423 (1959)	2
Rollins v. State of Florida Dept. of Law Enforcement, 868 F.2d 397 (11th Cir. 1989)	3, 4
St. Regis Paper Co. v. United States, 368 U.S. 208 (1961)	3
Standard Oil Co. v. Myers, 232 Ala. 662, 169 So. 312 (1936)	3
Valley Properties Inc. v. Strahan, 565 So. 2d 571 (Ala. 1990)	3

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STATEMENT

This reply brief is filed by the Petitioner in response to the "Brief for the Respondent in Opposition", and is filed pursuant to Supreme Court Rule 15.6., which provides that any petitioner "may file a reply brief addressed to new points raised in the brief in opposition. . . ."

At page 3 of the Respondent's brief, he contends that "the VA . . . assigned a committee of doctors culled from other VA offices to conduct the external review" and cites certain negative findings of that "committee." Actually, the review team consisted of only one physician and one coordinator who was a recreation specialist and not a physician. Pet. p. 4. As to the summarized "findings" of that team alluded to at page 3 of the Respondent's brief, the record reflects that Dr. Malladi responded to and refuted each of them. (R3-62, Exh. A, pp. 37-40, Atch 27). The team's references to complaints about Dr. Malladi's conduct were refuted when the medical center director, on December 20, 1995 and on January 22, 1996, provided memoranda stating that there were *no* complaints on file about her conduct. (*Id.*, Atch 29).

ARGUMENT

The decision of the courts below should be visited by this Court as being inconsistent with its prior decisions upon the issues of contract law and the "direct evidence" test.

1. In his brief in opposition, the Respondent has attempted to distinguish the case of *Raley v. Ohio*, 360 U.S. 423 (1959), by pointing out that in *Raley*, the petitioner had been subjected to criminal prosecution and had sought to invoke rights under the Fourteenth Amendment. Actually, *Raley* stands for the broader proposition that government should not be allowed to achieve a goal by resorting to tactics that constitute "active misleading." (*Id.* 360 U.S. at 438). This principle was also discussed in *Heckler v. Community Health Services*, 467 U.S. 51,

61 (1984), where this Court acknowledged that the government could be subjected to estoppel principles where citizens countervailing interests in a "minimum standard of decency, honor, and reliability in their dealing with their Government" were involved. The Court in *Heckler* quoted *inter alia*, from the case of *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), to this effect that "To say to these appellants, 'the joke is on you. You shouldn't have trusted us', is hardly worthy of our great government."

In the instant case, all elements of estoppel are present, because the Petitioner surrendered her rights under seven (7) EEO claims in return for the government's promise to reopen them if it did not discharge its responsibilities under the agreement. The Equal Employment Opportunity Commission found, and the district court, albeit reluctantly, agreed, that the VA failed to discharge its obligation to provide management training to Dr. Malladi. The resort to elements of law relating to breaches of contract, as the lower courts have done, has effectively supported the VA in its active misrepresentation to Dr. Malladi. As Justice Black has said in his dissenting opinion in *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961):

> "Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do."

Finally, even if the courts do elect to apply the law of contracts rigidly, it is generally held that misleading representations, even if innocently made, are sufficient to invalidate an agreement. See cases cited at 71 ALR 2d 118. *Humphrey v. Erie R. Co.*, 116 F. Supp. 660 (DC NY 1953); *Valley Properties Inc. v. Strahan*, 565 So. 2d 571 (Ala. 1990); *Standard Oil Co. v. Myers*, 232 Ala. 662, 169 So. 312 (1936).

In rejecting the Petitioner's claims of retaliation in this case, the lower courts have relied upon *Rollins v. State of*

Florida Dept. of Law Enforcement, 868 F.2d 397, 401 (11th Cir. 1989). The *Rollins* case is clearly distinguishable from this case, because the court there noted that Rollins had "disrupted the workplace by repeatedly making spurious claims of racially disparate treatment *in an extremely hostile and antagonistic manner.*" 868 F.2d at 398. (Emphasis added). There is absolutely no evidence in this case that Dr. Malladi *ever* acted in "an extremely hostile and antagonistic manner." As to the volume of her complaints, she waives what she does not file. The VA obviously did not view her first seven (7) charges as frivolous, because it settled them on terms favorable to Dr. Malladi (Pet. App. p. 6a), and the trial court has acknowledged that she made out a *prima facie* case of retaliation in her final two charges. (Pet. App. pp. 49a-50a).

2. At pages 8 and 9 of his brief, the Respondent argues that the lower courts correctly applied the indirect evidence, burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In so doing, he argues that the site visit reference to the EEO filings contain "merely passing mentions" of them, and that such reference "in no way constitutes direct evidence that the few references to petitioner's EEO complaints contained in the reports themselves influenced this action." While that argument might have been appropriate to present to a jury, it widely misses the mark upon the question of the issuance of a summary judgment. At the very least, the evidence presented regarding the effect of the EEO filings in the site visit report upon the treatment received by Dr. Malladi was due to be presented to a jury.

The trial court has conceded that "the request for the site visit and the site visit itself, began the steps that led to Malladi's detail, to the negative site visit team report, and to her reduction in pay, all of which no doubt had a serious impact on the terms and conditions of her employment." (Pet. App. p. 46a). A review of the evidence

regarding the site visit report's reference to the EEO filings and its effect on the VA's decision to detail and transfer Dr. Malladi reveals the following facts:

In spite of Dr. Malladi's successful performance on a recent review by the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"), and in spite of her recent "high satisfactory" to "outstanding" proficiency ratings, the medical center director requested the external review or site visit, which was conducted on December 14-15, 1995. (R3-62, Exh. A, pp. 1-2; R2-48, Exh. D, Atch 6). The stated purpose of the external review "was to review the clinical and administrative operation of the PM&RS Service, employee-management concerns, and to make recommendations to improve total service operation and morale." (*Id.*) Prior to their arrival on station at the TVAMC, the program reviewers, Dr. Leigh Anderson and Mr. John Jacobson, requested among other things, "[c]opies of all formal complaints, reports of contact, or grievances filed in the last 3 years . . . as they relate to the duties of the chief of PM&RS or other PM&RS staff." (R3-62-29, Exh. D). Upon their arrival at Tuskegee, the agenda established for their visit clearly indicates that they met with Dr. Tirado, the EEO manager at Tuskegee VAMC, immediately after they met with the medical center director, the chief of staff and the associate director (the "Triad"), and prior to their meeting with Dr. Malladi. (R3-62-29, Exh. A, Atch 24). John Jacobson testified that they met with Dr. Tirado and that "[s]he basically briefed us, I believe, on the history of the EEO complaints." (R3-62-29, Exh. E, p. 40).

Arthur Edwards, Chief of Human Resource Management, testified that Dr. Tirado was present at the December 14 meeting with the on-site team because the team "wanted to review some EEO records." (R3-62-30, Exh. F, p. 14). Dr. Kahane, the Chief of Staff, testified that he "did not recall" any conversation about Dr. Malladi's EEO complaints. (*Id.*, Exh. G, p. 107). Dr. Kahane, however, also testified that he did not think that EEO mate-

rial, which he described as "prohibited material" should have been transmitted to the team members before their arrival. (*Id.*, p. 107). Anderson's request, however, had clearly sought this information. (*Id.*, Exh. D). Moreover, "summaries of EEO complaints filed by Dr. V. Malladi October 1, 1992 to present" were provided to the on-site team with a letter from Mr. Clay, Medical Center Director, to Dr. Anderson dated December 1, 1995, some 13 days before the on-site team arrived, in which Mr. Clay was apparently responding to Dr. Anderson's request for information. (R2-49, Exh. D, Atch 5, p. 2).

The site visit was called for by the TVAMC Management without any internal focus review and without discussing any deficiencies or complaints with Malladi. Summaries of all her EEO cases were sent to that team even before their arrival at TVAMC. The team's report did not verify the statistics, did not verify the negative comments, and did not include any positive comments made by staff members regarding Malladi and her leadership. Malladi wrote a response to the team's report, (R3-62, Exh. A, pp. 37-40, Atch 27), and, under dates of December 20, 1995 and January 22, 1996, the medical center director provided Malladi with two memoranda stating that there were no complaints on file against her (*id.*, Exh. A, p. 38, Atch 29), a fact that directly refuted the site visit report regarding complaints from Malladi's subordinates.

After adopting language strongly critical of the EEO filings, the site review report recommended the removal of Malladi from her position. (R2-49-43). Kahane recommended her permanent reassignment *based on the report.* (R2-49, Exh. C, Atch 27). The Medical Center Director, Mr. Jimmie L. Clay, detailed Malladi away from her service *based on the site review report* and a memoranda from some members of Malladi's staff (R2-49, Exh. D, Atch 8), then permanently reassigned her. (R2-49, Exh. D, Atch 9).

The portion of the site visit report that refers to the EEO filings and is characterized as "merely passing mention" by the VA in its brief in opposition, and which is basically treated as irrelevant by the lower courts, is reported by the district court, at page 8a of the appendix as follows:

> "In discussion with the Chief of Staff, Medical Center Director and the Associate Director, *a strong concern was expressed regarding the inability of the Medical Center leadership to gain cooperation with the current Chief of PM&RS in resolving issues precipitating the site visit. This concern stems from the recent history of EEO complaints filed by the Chief, PM&RS.* Since December of 1992, the Chief, PM&RS has registered a total of 12 EEO complaints against the Director, Chief of Staff, and Associate Director (triad) alleging discrimination on the basis of race, disability and gender. In review of EEO records, the majority of filings stem from the Chief's perceived feeling of discrimination relating to the refusal by triad to provide additional physician staffing to PM&RS. Seven of the complaints have been resolved via a global settlement agreement signed March 30, 1995. The Chief has continued to register complaints to the EEO Commission based on perceived reprisal from the triad in relation to her original complaint. *As a result of the continued filing, the members of the triad feel incapacitated in providing the Chief with adequate direction and assistance in manageemnt of her service.* In discussion with Dr. Torrado, the Staff Assistant for EEO, this continued filing has also burdened the EEO system at the hospital and resulted in excessive provision of resources by the EEO staff to continually review Dr. Malladi's complaints.

(Emphasis added). When this language is viewed in the light of the site review team's recommendation to detail and transfer Dr. Malladi, followed by a chief of staff rec-

ommendation to do so, based on the review team's report, the direct evidence scenario is complete, particularly when the actions of the medical center director are also based upon the report and the ensuing recommendation.

CONCLUSION

It is respectfully submitted that the lower courts have erred in allowing the VA to escape its responsibility under an agreement it entered into with the Petitioner, and that they have further erred in applying the indirect burden-shifting *McDonnell Douglas* analysis to a case that clearly involves direct evidence.

Since the decisions of the lower courts are inconsistent with this Court's prior decisions, it is respectfully submitted that this Court should grant its writ of certiorari and direct the lower courts to order a trial of this cause.

Respectfully submitted,

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